SUPREME COURT OF THE UNITED STATES.

No. 296.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JOHN F. MORSE AND CHARLES C. PAIGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the justices of the supreme court of the State of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Wisconsin, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between John F. Morse and Charles C. Paige, plaintiffs, and the Home Insurance Company of New York, defendant, wherein was drawn in question the right of said defendant to remove a cause from the circuit court of Winnebago County, in the State of Wisconsin, to the circuit court of the United States for the eastern district of Wisconsin, under act of Congress approved Sept. 24, 1789, and denied, a manifest error hath happened, to the great damage of the said Home Insurance Company of New York, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right, and according to law and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

EDWARD KURTZ,
Clerk U. S. Circuit Court for East'n Dis't of Wis.

Allowed by me this 7th day of November, A. D. 1872.

LUTHER S. DIXON,
Chief Justice Supreme Court, Wis.

2 Supreme court, State of Wisconsin.

The return to the within writ appears by the schedule hereto annexed. The return of the justices of the supreme court of the State of Wisconsin.

Attest:

[SEAL.] LA FAYETTE KELLOGG,
Clerk Sup. C't, Wis.

(Indorsed:) In Supreme Court, State of Wisconsin. John F. Morse and Charles C. Paige vs. The Home Insurance Company of New York. Writ of error. Filed Nov. 8, 1872. L. F. Kellogg, clerk sup. c't, Wis.

3 The United States of America, greeting, to John F. Morse and Charles C. Paige:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein the

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the justices of the supreme court of the State of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Wisconsin, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between John F. Morse and Charles C. Paige, plaintiffs, and the Home Insurance Company of New York, defendant, wherein was drawn in question the right of said defendant to remove a cause from the circuit court of Winnebago County, in the State of Wisconsin, to the circuit court of the United States for the eastern district of Wisconsin, under act of Congress approved Sept. 24, 1789, and denied, a manifest error hath happened, to the great damage of the said Home Insurance Company of New York, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right, and according to law and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

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Clerk U. S. Circuit Court for East'n Dis't of Wis.

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3 The United States of America, greeting, to John F. Morse and Charles C. Paige:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein the

Home Insurance Company of New York is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Luther S. Dixon, chief justice of the supreme court of the State of Wisconsin, this seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two.

LUTHER S. DIXON,
Chief Justice of the Supreme Court of the State of Wisconsin.

4 (Indorsed:) In supreme court, State of Wisconsin. John F. Morse et al. vs. The Home Insurance Company of New York. Citation. Filed Nov. 22, 1872. L. F. Kellogg, clerk sup. c't, Wis.

Service of copy admitted this 2 day of November, A. D. 1872, under protest.

GABE BOUCK,
Att'y for D'f't.

5 In supreme court, State of Wisconsin.

JOHN F. MORSE AND CHARLES C PAIGE
vs.
THE HOME INSURANCE COMPANY OF NEW YORK.

SUPREME COURT OF THE STATE OF WISCONSIN, *ss:*

Decided by the said supreme court of the State of Wisconsin at its June term, A. D. 1872, to wit, on the 30 day of October, A. D. 1872.

Know all men by these present that we, J. Albert Helfenstein and Henry H. West, of the county of Milwaukee, in the State of Wisconsin, are held and firmly bound unto John F Morse and Charles C. Paige, of the city of Oshkosh, in the State of Wisconsin, in the sum of eight thousand dollars, to be paid to the said John F. Morse and Charles C. Paige, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this seventh day of October, A. D. one thousand eight hundred and seventy-two.

6

Whereas the Home Insurance Company of the city of New York hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled cause by the supreme court of the State of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named The Home Insurance Company of the city of New York shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Signed with our hands and seals the day and year above written.

J. ALBERT HELFENSTEIN. [SEAL.]
HENRY W. WEST. [SEAL.]

STATE OF WISCONSIN, *Milwaukee County, ss:*

7 J. Albert Helfenstein and Henry H. West, each for himself, says that he is a resident of the county of Milwaukee, and freeholders in said county, and that they are each worth the sum of six thousand dollars over and above all debts, set-offs, and exemptions; and further saith not.

J. ALBERT HELFENSTEIN.
HENRY H. WEST.

Subscribed and sworn to before me this 7th day of November, A. D. 1872.

WILLIAM J. C. FORSTER,
Notary Public in & for Milwaukee Co., Wisconsin.

(Indorsed:) In supreme court, State of Wisconsin. John F. Morse & Charles C. Paige vs. The Home Insurance Company of New York. Copy of bond.

I approve of the within bond & sureties Nov. 7th, 1872.

LUTHER S. DIXON,
Chief Justice Sup. Ct, Wis.

8 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at Madison, the seat of government of said State, on the first Tuesday, to wit, the fourth day of June, A. D. 1872.

Present, the Hon. Luther S. Dixon, chief justice; the Hon. Orsamus Cole and the Hon. William P. Lyon, associate justices.

Attest:

LA FAYETTE KELLOGG, *Clerk.*

Be it remembered that, heretofore, to wit, on the twenty-fifth day of May, A. D. 1872, came into the office of the clerk of said supreme court The Home Insurance Company of New York, by Messrs. Finches, Lynde and Miller, its attorneys, and filed their certain notice of argument in the words and figures following, that is to say:

9 *Notice of argument.*

Supreme court, State of Wisconsin.

JOHN F. MORSE, CHARLES C. PAIGE, respondents,
vs.
THE HOME INSURANCE COMPANY OF NEW York, appellant. } Winnebago circuit court.

Please to take notice that the in the above-entitled action will be brought on for argument at the June term of the supreme court, of the State of Wisconsin, appointed to be held at the capitol, in the city of Madison, on the 4th day of June next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated May 21, 1872.

Yours, &c.,

FINCHES, LYNDE AND MILLER,
Attorneys for Appellant.

To GABE BOUCK, Esq.,
Attorney Respondent.

Service admitted of copy this 23 day of May, 1872.

GABE BOUCK, *Att'y for Resp.*

10 And afterwards, to wit, on the twenty-seventh day of May, A. D. 1872, the said appellants, by their attorneys aforesaid, filed in the clerk's office aforesaid their certain notice of appeal and undertaking in the words and figures following, that is to say:

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF NEW York City, defendant.

Please take notice that the above-named defendant, feeling aggrieved by the judgment heretofore rendered in this cause for thirty-five hundred and fifty-seven $\frac{82}{100}$ dollars damages, and sixty-three $\frac{11}{100}$ dollars costs, hereby appeals said judgment, and the whole thereof, to the supreme court of the State of Wisconsin, May 10th, 1872.

FINCHES, LYNDE & MILRER,
Atty's for said Defendants.

To G. BOUCK, Esq., *att'y for pl'ffs*, and
To the CLERK of the circuit court of Winnebago County.

11 Filed May 16, 1872.

H. B. HARSHAW, *Clerk.*

Undertaking on appeal from a judgment directing the payment of money.

State of Wisconsin, circuit court, Winnebago County.

JOHN F. MORSE & CHARLES C. PAIGE, respondents,
against
THE HOME INSURANCE COMPANY OF New York City, appellant.

Whereas, on the 22nd day of December, 1871, in the said circuit court, the above-named respondent recovered a judgment against the above-named appellant for thirty-six hundred an' twenty $\frac{93}{100}$ dollars damages and costs; and the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, Mark S. Tyson, of Milwaukee, and Jasper Humphrey of Milwaukee, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said ap-
12 peal, not exceeding two hundred and fifty dollars; and do also undertake that, if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

Dated May 10th, 1872.

MARK S. TYSON.
J. HUMPHREY.

MILWAUKEE COUNTY, *ss:*

Mark S. Tyson, one of the subscribers to the fore*tak*ing undertaking, being sworn, says that he is a resident and freeholder within this State, and is worth the sum of six thousand dollars over and above all debts, set-offs, & exemptions.

MARK S. TYSON.

Sworn to before me this 10th day of May, 1872.

B. K. MILLER,
Notary Public, Milwaukee Co., Wisconsin.

MILWAUKEE COUNTY, *ss:*

Jasper Humphrey, one of the subscribers to the foregoing undertaking, being sworn, says that he is a resident and freeholder
13 within this State, and is worth the sum of six thousand dollars over and above all debts, set-offs, and exemptions.

J. HUMPHREY.

Subscribed and sworn to before me this 10th day of May, 1872.

B. K. MILLER,
Notary Public, Milwaukee Co., Wis.

MILWAUKEE COUNTY, *ss:*

I certify that, on this 10th day of May, 1872, Mark S. Tyson and Jasper Humphrey, above named, to me known, personally appeared before me and severally acknowledged that they executed the above undertaking as their own free act for the uses and purposes therein mentioned.

B. K. MILLER,
Notary Public, Milwaukee Co., Wis.

Filed May 16, 1872.

H. B. HARSHAW, *Clerk.*

And afterwards, to wit, on the day and year last aforesaid, the clerk of the circuit court of Winnebago County filed in the office of clerk of the said supreme court his return to said appeal in the words
14 and figures following, that is to say:

In circuit court, Winnebago County, Wisconsin.

JOHN F. MORSE AND CHARLES C. PAIGE *ag't* THE HOME INSURANCE COMPANY OF THE City of New York. } Place of trial, Winnebago County.

The plaintiffs complain and allege:

I. Upon information & belief that the defendant is a corporation duly created & organized by & under the laws of the State of New York for the purpose of carrying on fire-insurance business, and is duly authorized to carry on such business in the States of New York and Wisconsin, and was so authorized and made a corporation at and during all the time & times hereinafter mentioned.

II. That the defendant, as such corporation, has been carrying on fire-insurance business in the State of Wiscousin for more than two years immediately last past.

III. That the plaintiffs are now, and have been for more than
15 two years immediately last past, partners in business, and as such partners have done business under the partnership name and style of J. F. Morse & Co.

IV. That on the 12th day of June, A. D. 1871, and at the time of the execution and delivery of the policy of insurance hereinafter mentioned, the plaintiffs were the owners of the steamboat Diamond, her tackle, apparel, furniture, machinery, and supplies thereon, and of the undivided three-fourths of the steamboat E. P. Weston, her tackle, apparel, furniture, machinery, and supplies thereon, and were the owners of the same, to wit, all the aforesaid property, at the time of the distruction and injury of the steamboat Diamond, in tackle, apparel, furniture, machinery, and supplies thereon, by fire, as hereinafter mentioned.

V. That on the twelfth (12) day of June, A. D. 1871, at the city of Oshkosh, Winnebago County, Wisconsin, in consideration of one hundred and thirty-seven $\frac{50}{100}$ dollars, by the plaintiffs then and there paid to the defendant, the defendants then and there duly executed and delivered to the plaintiffs, under their said partnership name, a policy of insurance against loss or damage by fire, on the aforesaid steam-
16 boat Diamond, her tackle, apparel, furniture, machinery, and supplies thereon, and upon the plaintiffs' said undivided three-fourths intersest in the steamboat E. P. Weston, her tackle, apparel, furniture, machinery, and supplies thereon, for fifty-five hundred dollars, and which said policy of insurance was in the following words and figures:

STOCK COMPANY.—CASH CAPITAL, $2,500,000.

17 No. 2369.] [$5,500.

By this policy of insurance, the Home Insurance Company of the City of New York, in consideration of one hundred & thirty-seven $\frac{50}{100}$ dollars, to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure J. F. Morse & Co. against loss or damage by fire, to the amount of five thousand five hundred dollars, as follows: $3,500 on their steamboat Diamond, her tackle, apparel, furniture, machinery, and supplies thereon, and $2,000 on their undivided $\frac{3}{4}$ interest in the steamboat E. P. Weston, her tackle, apparel, furniture, machinery, & supplies thereon. Permission given to insure $5,500 additional, and to run on the Fox & Wolf Rivers and their tributaries, & make the usual repairs.

Sum insured: $5,500.

Time: 1 year.

Rate: 2½

Premium: $137.50

And the said Home Insurance Company hereby agree to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the twelfth day of June, one thousand eight hundred and seventy-one, at twelve o'clock at noon, to the twelfth day of June, one thousand eight hundred and seventy-two, at twelve o'clock at noon; the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in New York, in accordance with the terms and provisions of this policy, unless the property be replaced, or the company shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain for more than 30 days without notice to, and consent of, this company, in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this company endorsed hereon; or if it be a manufacturing establishment, running, in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred, or any change takes place in title or possession, whether by legal process, or judicial decree, or voluntary transfer, or conveyance; or if this policy shall be assigned before a loss without the consent of the company endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy; then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for lights in dwellings, stores, churches, and school-houses, and kept for sale in stores in quantities not exceeding five barrels—to be drawn by day-light only.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments, (piano-fortes in dwellings excepted,) ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire; nor for money, or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, or any explosive substance; nor by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use

and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereupon, except as may be hereafter agreed to by this corporation, in writing, upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do, this company will not be liable for damage caused by such failure; and there can be no abandonment to the company of the property insured.

The use of general terms, or anything less than a distinct, specific agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that, in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy attaching, in whole or in part, to the property covered by this policy, shall, as between the insured and this company, be considered as contributing insurance for the full amount of such policy, and liable as such to pay pro rata any loss, total or partial, on the property hereby insured.

Re-insurance, in case of loss, to be settled in proportion as the sum re-insured shall bear to the whole sum covered by the re-insured company.

8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or notary public, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud,

sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company.

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made, and furnished to the company, of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers,) to be mutually appointed by the assured and the company; their report, in writing, to be made under oath before any magistrate or other properly commissioned person; one-half of the appraisers' fees to be paid by the assured. The company reserve the right to take the whole or any part of the articles at their appraised value; and until such proofs declarations and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable.

In case of loss on property held in trust, or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

But provided, in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required; and, in case this company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suit able deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞GAS.—The generating or evaporating within the building or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

☞Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy, unless separately and specifically mentioned.

☞Plate glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not covered by insurance on the building, but must be separately and specifically insured.

☞Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

☞BUILDERS' RISK.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics, in building, altering or repairing the premises named in this policy, will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

☞And it is hereby understood and agreed, by and between this company and the assured, that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to, in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing.

In witness whereof the Home Insurance Company have caused these presents to be signed by their president, and attested by their secretary, in the city of New York. But this policy shall not be valid unless coun-

tersigned by the duly authorized agent of said Home Insurance Company at Oshkosh, Wis.

CHA'S J. MARTIN,
President.
J. H. WASHBURN,
Secretary.

Countersigned at Oshkosh this 12th day of June, 1871.

GARY & HARMON,
Agent.

[50 cent. internal-revenue stamp, cancelled.]

Classes of hazards

HAZARDOUS.

Bristles and hair cloth, (wholesale,)
Boots and shoes, (wholesale,) including India rubber boots and shoes
Carpets, (retail stocks of,)
Card printing, (by hand power,)
Carriage trimmings,
Carriages and sleighs,
Clothing, (wholesale stocks of,) ready-made,
Coffee,
Cordage,
Cotton batts and wadding,
Cotton yarn,
Dry goods, foreign and domestic, exclusively in unbroken and unopened packages,
Dry goods, (wholesale stocks of,)
Drugs, dry in packages, (importers' stocks of,)
Flax, in bales,
Fire-crackers, in packages,
Flocks,
Flour,
Fruits, (wholesale stocks of,)
Furs and peltries, in unbroken packages,
Furs, unpacked,
Grocers' stocks,
Grocers' stocks, (retail,)
Glass, window, in boxes,
Gum copal,
Gum shellac,
Gunny cloth and gunny bags,
Gutta-percha, unmanufactured,
Hardware, staple, in packages,
Hatters' furs, (stocks of,)
Hats and caps, (wholesale stocks of,) without manufacturing,
Hemp, in bales,
Hides and sole leather,
Hops, in bales,
India-rubber, unmanufactured,
Indigo,
Iron-ware, wholesale, (also stoves, tin-ware, and hollow-ware,)
Iron goods, ornamental, japanned & bronzed, (stocks of,)
Leather, morocco and findings,
Machinery, (stocks of,) on sale,
Manilla grass, in bales,
Men's straw hats and caps, (stocks of,)
Nails, (stocks of,)
Oakum, in bales,
Oil, (fish and vegetable,)
Oil-cloths, (stocks of,)
Paints, ground in oil,
Paper in reams, and straw boards,
Paper hangings, (wholesale,)
Pins, (stocks of,)
Pot, pearl, and soda ashes,
Provisions,
Rice,
Saddlery and harness, (stocks of,)
Sail-making,
Salt,
Sewing-machines, (stocks of,)
Sisal grass, in bales,
Spices,
Sugars,
Sulphur,
Tallow,
Teas,
Threshed grain,
Tobacco, plug and twist, in boxes or kegs, (wholesale.) [See extra hazardous.]
Trunks, (stocks of,)
Whalebone,
Whiskey, in barrels, (stocks of,)
Wool,
Wines and liquors, in packages, (importers' stocks of.)

EXTRA HAZARDOUS.

Artificial flowers,
Artists' materials,
Auction stores,
Agricultural implements, including seedmen's stocks,
Alcohol,
Apothecaries' stocks,
Asphaltum,
Bandboxes, (stocks of,)
Booksellers' stocks,
India rubber goods, (stocks of,) except boots and shoes,
Iron, (hoop, sheet and rod,)
Jewelers' and watch-makers' stocks,
Kid gloves, (stocks of,)
Ladies' and children's furnishing goods, (stocks of,)
Laces and embroideries, (wholesale,)
Lampsellers' stocks, without camphene, burning fluid, spirit gas, or kerosene,

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞GAS.—The generating or evaporating within the building or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

☞Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy, unless separately and specifically mentioned.

☞Plate glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not covered by insurance on the building, but must be separately and specifically insured.

☞Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

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In witness whereof the Home Insurance Company have caused these presents to be signed by their president, and attested by their secretary, in the city of New York. But this policy shall not be valid unless coun-

tersigned by the duly authorized agent of said Home Insurance Company at Oshkosh, Wis.

CHA'S J. MARTIN,
President.
J. H. WASHBURN,
Secretary.

Countersigned at Oshkosh this 12th day of June, 1871.

GARY & HARMON,
Agent.

[50 cent. internal-revenue stamp, cancelled.]

Classes of hazards

HAZARDOUS.

Bristles and hair cloth, (wholesale,)
Boots and shoes, (wholesale,) including India rubber boots and shoes
Carpets, (retail stocks of,)
Card printing, (by hand power,)
Carriage trimmings,
Carriages and sleighs,
Clothing, (wholesale stocks of,) ready-made,
Coffee,
Cordage,
Cotton batts and wadding,
Cotton yarn,
Dry goods, foreign and domestic, exclusively in unbroken and unopened packages,
Dry goods, (wholesale stocks of,)
Drugs, dry in packages, (importers' stocks of,)
Flax, in bales,
Fire-crackers, in packages,
Flocks,
Flour,
Fruits, (wholesale stocks of,)
Furs and peltries, in unbroken packages,
Furs, unpacked,
Grocers' stocks,
Grocers' stocks, (retail,)
Glass, window, in boxes,
Gum copal,
Gum shellac,
Gunny cloth and gunny bags,
Gutta-percha, unmanufactured,
Hardware, staple, in packages,
Hatters' furs, (stocks of,)
Hats and caps, (wholesale, stocks of,) without manufacturing,
Hemp, in bales,
Hides and sole leather,
Hops, in bales,
India-rubber, unmanufactured,
Indigo,
Iron-ware, wholesale, (also stoves, tin-ware, and hollow-ware,)
Iron goods, ornamental, japanned & bronzed, (stocks of,)
Leather, morocco and findings,
Machinery, (stocks of,) on sale,
Manilla grass, in bales,
Men's straw hats and caps, (stocks of,)
Nails, (stocks of,)
Oakum, in bales,
Oil, (fish and vegetable,)
Oil-cloths, (stocks of,)
Paints, ground in oil,
Paper in reams, and straw boards,
Paper hangings, (wholesale,)
Pins, (stocks of,)
Pot, pearl, and soda ashes,
Provisions,
Rice,
Saddlery and harness, (stocks of,)
Sail-making,
Salt,
Sewing-machines, (stocks of,)
Sisal grass, in bales,
Spices,
Sugars,
Sulphur,
Tallow,
Teas,
Threshed grain,
Tobacco, plug and twist, in boxes or kegs, (wholesale.) [See extra hazardous.]
Trunks, (stocks of,)
Whalebone,
Whiskey, in barrels, (stocks of,)
Wool,
Wines and liquors, in packages, (importers' stocks of.)

EXTRA HAZARDOUS.

Artificial flowers,
Artists' materials,
Auction stores,
Agricultural implements, including seedmen's stocks,
Alcohol,
Apothecaries' stocks,
Asphaltum,
Bandboxes, (stocks of,)
Booksellers' stocks,
India rubber goods, (stocks of,) except boots and shoes,
Iron, (hoop, sheet and rod,)
Jewelers' and watch-makers' stocks,
Kid gloves, (stocks of,)
Ladies' and children's furnishing goods, (stocks of,)
Laces and embroideries, (wholesale,)
Lampsellers' stocks, without camphene, burning fluid, spirit gas, or kerosene,

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

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12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

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CHA'S J. MARTIN,
President.
J. H. WASHBURN,
Secretary.

Countersigned at Oshkosh this 12th day of June, 1871.

GARY & HARMON,
Agent.

[50 cent. internal-revenue stamp, cancelled.]

Classes of hazards

HAZARDOUS.

Bristles and hair cloth, (wholesale,)
Boots and shoes, (wholesale,) including India rubber boots and shoes
Carpets, (retail stocks of,)
Card printing, (by hand power,)
Carriage trimmings,
Carriages and sleighs,
Clothing, (wholesale stocks of,) ready-made,
Coffee,
Cordage,
Cotton batts and wadding,
Cotton yarn,
Dry goods, foreign and domestic, exclusively in unbroken and unopened packages,
Dry goods, (wholesale stocks of,)
Drugs, dry in packages, (importers' stocks of,)
Flax, in bales,
Fire-crackers, in packages,
Flocks,
Flour,
Fruits, (wholesale stocks of,)
Furs and peltries, in unbroken packages,
Furs, unpacked,
Grocers' stocks,
Grocers' stocks, (retail,)
Glass, window, in boxes,
Gum copal,
Gum shellac,
Gunny cloth and gunny bags,
Gutta-percha, unmanufactured,
Hardware, staple, in packages,
Hatters' furs, (stocks of,)
Hats and caps, (wholesale stocks of,) without manufacturing,
Hemp, in bales,
Hides and sole leather,
Hops, in bales,
India-rubber, unmanufactured,
Indigo,
Iron-ware, wholesale, (also stoves, tin-ware, and hollow-ware,)
Iron goods, ornamental, japanned & bronzed, (stocks of,)
Leather, morocco and findings,
Machinery, (stocks of,) on sale,
Manilla grass, in bales,
Men's straw hats and caps, (stocks of,)
Nails, (stocks of,)
Oakum, in bales,
Oil, (fish and vegetable,)
Oil-cloths, (stocks of,)
Paints, ground in oil,
Paper in reams, and straw boards,
Paper hangings, (wholesale,)
Pins, (stocks of,)
Pot, pearl, and soda ashes,
Provisions,
Rice,
Saddlery and harness, (stocks of,)
Sail-making,
Salt,
Sewing-machines, (stocks of,)
Sisal grass, in bales,
Spices,
Sugars,
Sulphur,
Tallow,
Teas,
Threshed grain,
Tobacco, plug and twist, in boxes or kegs, (wholesale.) [See extra hazardous.]
Trunks, (stocks of,)
Whalebone,
Whiskey, in barrels, (stocks of,)
Wool,
Wines and liquors, in packages, (importers' stocks of.)

EXTRA HAZARDOUS.

Artificial flowers,
Artists' materials,
Auction stores,
Agricultural implements, including seedmen's stocks,
Alcohol,
Apothecaries' stocks,
Asphaltum,
Bandboxes, (stocks of,)
Booksellers' stocks,
India rubber goods, (stocks of,) except boots and shoes,
Iron, (hoop, sheet and rod,)
Jewelers' and watch-makers' stocks,
Kid gloves, (stocks of,)
Ladies' and children's furnishing goods, (stocks of,)
Laces and embroideries, (wholesale,)
Lampsellers' stocks, without camphene, burning fluid, spirit gas, or kerosene,

Boots and shoes, (retail,)
Brushes, (stocks of,)
Bag making, (cloth,) by hand-power,
Bakeries, with ovens outside the building, and using coal only,
Basket selling,
Billiard saloons and contents,
Blacksmith shops,
Boot and shoe manufacturing by hand-power only,
Bottling cellars,
Brush-makers' stock,
Cabinet-ware, without manufacturing, repairing, upholstering or varnishing
Carving, by hand-power,
China, unpacked,
Clothing, ready-made, (retail stocks of,) also merchant tailors,
Confectioners' stocks,
Corks, (stocks of,)
Car-springs, (gutta-percha or India rubber,)
China, or earthen or glass-ware, (wholesale and retail stocks of,) with privilege of packing or unpacking,
Copper-plate printing,
Coopers' shops, (strapping boxes only,)
Corset making,
Daguerreotype and Photographic stocks,
Daguerreotype and Photographic establishments,
Dress trimmings, (stocks of,)
Dry goods, (retail stocks of,)
Earthen ware, (unpacked,)
Eating-houses,
Electro-plating,
Essential oils,
Fancy goods, (wholesale and retail stocks of,)
Feathers, (stocks of,)
Fishing tackle,
Fringes, (stocks of,)
Fringe-making, by hand-power,
Fruits, (retail stocks of,)
Furriers' and hatters' stocks, unpacked,
Furs, cutting and sewing, without fire heat,
Gas-fitting,
Gas-fixtures,
Gentlemen's furnishing goods, (wholesale and retail stocks of,)
Gimps, (stocks of,)
Glass, window or plate unpacked,
Glass-ware unpacked; looking-glasses, unpacked,
Gilding,
Gun repairing,
Gutta-percha goods, except boots and shoes,
Hardware and cutlery,
Hats and caps, (retail,) without manufacturing,
Hat, (straw, grass or chip,) bleaching,
Hay and straw, pressed in bundles,
Hoop-skirts and hoop-skirt materials, (stocks of,)
Hoop-skirt manufacturing by hand, without fire heat,
House-furnishing goods, (retail stocks of,)
Lager-bier saloons,
Lime, unslacked, (stocks of,)
Liquors, in glass, unpacked,
Lithographers,
Looking-glasses, (stocks of,) with privilege of packing or unpacking,
Map mounting and varnishing,
Matches on sale, (stocks of,)
Metals, in bars, pig and tin plates,
Military goods, (stocks of,)
Millinery goods, (wholesale and retail stocks of,)
Needles, (stocks of,)
Optical and mathematical instrument maker's stocks,
Painters' stocks,
Paper-hangings, (retail stocks,)
Paper collars,
Paper boxes, (stocks of,)
Pawnbrokers' stocks,
Perfumers' stocks,
Precious stones,
Percussion caps,
Piano-fortes in ware-rooms,
Picture-frame joining,
Pitch,
Plumbing and pewtering,
Pocket-book makers' stock,
Pocket-book making, (without use of fire heat,)
Porter-houses, bar-rooms, sample-rooms, and retail liquor stores,
Rags, in bales,
Rectifying liquors by cold process only,
Refectories,
Restaurants,
Resin,
Saddlery and harness manufacturing,
Sheet iron and copper ware, (retail,)
Shirt manufactories, (without ironing,)
Ship chandlery,
Silversmiths' stocks,
Silver and plated ware,
Spirits of turpentine,
Stationers' stock,
Stoves, (retail stocks of,)
Straw goods, (wholesale and retail stocks of,)
Tar,
Tailors' trimmings, (stocks of,)
Tin and hollow-ware, (retail,)
Tin or sheet iron or copper working,
Tobacco leaf and cut, cigars and snuff, (wholesale and retail,)
Tow, in bales,
Turpentine,
Umbrellas and parasols, (wholesale and retail,) with privilege to put together and finish by hand only,
Upholsterers' stocks,
Watch-makers' tools,
Watches, in packages, as imported,
Wine, in glass, unpacked,
Worsteds and fancy wools, (importers' stocks of,)
Yankee notions.

SPECIALLY HAZARDOUS.

Acids, (nitric, sulphuric, muriatic, and other acids causing ignition,)
Band-box and paper-box making,
Bakeries, ovens within the building, or using wood or shavings,
Bark mills,
Bellows making,
Bleaching works,
Blind-makers' shops,
Blacksmithing,
Block and pump making,
Boat-builders' shops,
Book-binderies,
Boot and shoe manufactories, with fire heat,
Box repairing,
Brass foundries,
Breweries,
Brick yards, with kilns,
Brimstone works,
Brush manufactories,
Burning fluid,
Cabinet-makers' shops,
Cabinet ware, (stocks of,) with privilege to varnish and upholster,
Candle manufactories,
Camphene, on sale,
Cap manufactories,
Carpenters' shops,
Chair-makers' shops,
Chemical laboratories,
Coach-makers' shops,
Coffee and spice mills,
Comb manufactories,
Confectionery manufactories,
Coopers' shops,
Coppersmiths' shops with forges,
Corn kilns,
Cotton mills,
Cotton presses,
Cotton, in bales,
Cotton, unpacked,
Distilleries and rectifying establishments,
Drug stores, with privilege of compounding,
Druggists' stock, (wholesale,)
Drug and spice mills,
Dyeing establishments,
Ether,
Fire-works,
Fire-work manufactories,
Flax mills,
Flax unpacked,
Floor-cloth manufactories,
Fringe manufactories,
Fulling mills,
Fur-dressing establishments,
Gas-fixtures manufactories,
Gas manufactories,
Glass manufactories,
Gold pen making,
Grate manufactories,
Grist or flouring mills,
Gun manufactories,
Gunpowder,
Hat manufactories,
Hay, unpacked,
Hay presses,
Hemp manufactories,
Hoop-skirt manufactories, by machinery or fire heat,
Livery stables,
Looking-glass and picture frame manufactories,
Lumber yards,
Machine shops,
Manilla grass, unpacked,
Mahogany yards,
Malt houses,
Match manufactories,
Metal mills,
Musical instrument manufactories,
Musical instruments, (stocks of,)
Mungo,
Nitrate of soda,
Oiled clothing manufactories,
Oiled clothing, (stocks of,)
Oil mills and manufactories,
Oils, resin, and similar,
Oil refineries,
Omnibus stables,
Packing buildings and yards,
Paper-bag manufactories,
Paper-hanging manufactories,
Paper mills,
Percussion cap manufactories,
Perfumery manufactories,
Phosphorus,
Pictures and prints,
Planing, or grooving, or moulding mills,
Plating,
Plated-ware manufacturing,
Pocket-book making,
Pork houses,
Powder mills,
Printed music,
Printing of books, and job printing,
Print works,
Provisions in process of being smoked,
Rag stores,
Rags and paper stock,
Rolling mills,
Rope and cordage manufactories,
Safe (iron) manufastories,
Saltpetre,
Sash-makers' shops,
Saw mills,
Segar manufactories,
Ship building or repairing,
Shoddy,
Silversmiths' manufactories,
Smoke-houses.
Snuff mills,
Soap manufactories,
Spirit gas manufactories, and spirit gas on sale,
Stave yards,
Steamboats,
Steam-boilers in use,
Steam-engines in use,
Stove manufactories,
Sugar refineries,
Tallow-melting establishments,
Tanneries,
Tar-boiling establishments,
Taverns,
Theatres & other places of public exhibit'n,
Timber yards,
Tobacco manufactories,
Tow, unpacked,

Hemp, unpacked,
Hotels,
Houses building or repairing,
Ink manufactories,
India-rubber and gutta-percha manufactories,
Iron foundries,
Ivory-black and lamp-black manufactories,
Japanning,
Jewelry manufactories,
Jewelry case making,
Junk shops,
Lamp manufactories,
Lampsellers' stocks (with privilege of keeping camphene or kerosene,)
Laundries,
Lime yards and sheds,
Lime, unslacked,
Toys (shopkeepers' stocks of,)
Trunk making,
Turpentine distilleries,
Type and stereotype foundries,
Umbrella manufactories,
Upholstery manufactories,
Varnish manufactories,
Wheelwrights' shops,
Window shade painting,
Wood and willow-ware, (stocks of,)
Wooden mills,
Wool waste.

And generally all workshops, mills, and manufacturing establishments, and all trades and occupations requiring the use of fire heat not above enumerated as hazardous or extra hazardous.

The Home Insurance Company hereby consent that the interest of in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to

187 *Agent.*

For value received, hereby transfer, assign and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal, this day of 187

[Stamp,]

Sealed and delivered in presence of—

[L. S.]

The Home Insurance Company hereby consent that the interest of in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to

187 *Agent.*

For value received, hereby transfer, assign, and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal, this day of 187

[Stamp.]

Sealed and delivered in presence of—

[L. S.]

THE HOME INSURANCE COMPANY, OF THE CITY OF NEW YORK.—CASH CAPITAL, $2,500,000.

J. H. WASHBURN, *Secretary.* CHARLES J. MARTIN, *President.*
GEORGE M. LYON, *Assis't Sec't'y.* A. F. WILLMARTH, *Vice-President.*
T. B. GREENE, *2d Assis't Sec't'y.* D. A. HEALD, *2d Vice-President.*

DIRECTORS.

GEORGE C. COLLINS, firm of George C. Collins & Co.
DANFORD N. BARNEY, " Wells, Fargo & Co.
LUCIUS HOPKINS, " Hopkins, Dwight & Trowbridge.

THOMAS MESSENGER, late of T. & H. Messenger.
WILLIAM H. MELLEN, late firm of Claflin, Mellen & Co.
HOMER MORGAN, 2 Pine Street.
LEVI P. STONE, late firm of Stone, Starr & Co.
WARD A. WORK, " Ward A. Work & Son.
ISAAC H. FROTHINGHAM, President Union Trust Co.
CHARLES A. BULKLEY, firm of Bulkley & Co.
GEORGE D. MORGAN, late firm of E. D. Morgan & Co.
OLIVER E. WOOD, " O. E. Wood & Co.
ALFRED S. BARNES, " A. S. Barnes & Co.
GEO. BLISS, " Geo. Bliss & Co.
LEVI P. MORTON, " L. P. Morton & Co.
CURTIS NOBLE, " Noble & Betts.
JOHN B. HUTCHINSON, " J. C. Howe & Co., Boston.
CHARLES P. BALDWIN, " Baldwin, Starr & Co.
AMOS T. DWIGHT, late " Trowbridge, Dwight & Co.
HENRY A. HURLBUT, late " Swift, Hurlbut & Co.
JESSE HOYT, " Jesse Hoyt & Co.
WILLIAM STURGIS, late " Sturgis, Shaw & Co.
CHARLES J. MARTIN, *President.*
JOHN R. FORD, late " Ford Rubber Company.
GEORGE T. STEDMAN, " Stedman & Shaw, Cin.
SIDNEY MASON, late " Mason & Thompson.
F. H. COSSITT, 37 Pine Street.
A. F. WILMARTH, *Vice-President.*
WM. R. FOSDICK, late firm of Wm. R. & Cha's B. Fosdick.
DAVID I. BOYD, " Boyd, Brother & Co., Albany, N. Y.
LEWIS ROBERTS, " L. Roberts & Co.
WM. H. TOWNSEND, " Henrys, Smith & Townsend.
THOMAS T. BUCKLEY, " Buckley, Sheldon & Co.
P. C. VAN SCHAICK, late " Van Schaick & Edwards.
OLIVER S. CARTER, " Carter & Hawley.
HENRY M. TABER, " C. C. & H. M. Taber.
GEORGE W. PARSONS, " Barney, Butler & Parsons.
BENJAMIN TOMES, " Tomes, Melvain & Co.
EDWARD A. QUINTARD, " Quintard, Ward & Co.
WM. C. FOWLER, " Fowler, Crampton & Co.
D. A. HEALD, *2d Vice-President.*
AMOS H. TROWBRIDGE, Prest. 2d Na. Bank.
REUNE MARTIN, H. G. Thompson & Co.
HENRY R. PIERSON, Vice-Pres't Chicago & N. W. R. R. Co., Chicago.

☞If this policy is cancelled the following receipt is to be filled up and signed by the assured.

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In consideration of dollars, return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Home Insurance Company.

Assured.

(Indorsed:) No. 21369. Home Insurance Company, office, No. 135 Broadway, New York. Cash capital, $2,500,000. J. F. Morse & Co., Oshkosh. $5,500, premium, $137.50; policy and survey, $. This policy expires June 12th, 1872. Gary & Harman, agents. Ed. May, 1869.

20 VI. That on the twenty-second (22) day of June, A. D. 1871, the said steamboat Diamond, her tackle, apparel, furniture, machinery, and supplies thereon, to wit, the property so insured in said policy, was totally destroyed by fire, except the hull, which was partially saved, greatly damaged, and the remnants of the machinery thereof which could not be wholly consumed by the fire.

VII. That the plaintiffs' loss thereby was eight thousand four hundred and seventy-eight $\frac{13}{100}$ dollars, that is to say, that the said steamboat Diamond, her tackle, apparel, furniture, machinery, and supplies thereon were injured, damaged, and destroyed to the value of eight thousand four hundred and seventy-eight $\frac{13}{100}$ dollars, exclusive of any fixture thereof saved, to wit, the hull, as aforesaid, and the remnants of the machinery, as aforesaid.

VIII. That said fire, loss, or damage was not caused by means of invasion, insurrection, riot, civil commotion, or military or usurped power, nor in consequence of any neglect or deviation from the laws or regulations of the police existing at the time of such fire.

21 VIII½. That the aforesaid fire, by which the said property was destroyed as aforesaid, was accidental.

IX. That the plaintiffs forthwith, after such loss, gave notice to the defendant thereof, and on the 28th day of July, A. D. 1871, furnished the defendant with due proof of their said loss and damage, and as required in and by the said policy.

X. That the reason why plaintiffs did not make out the proofs of loss sooner, was that the delay was caused by the acts of the agent of the defendant, selected by the defendant to adjust plaintiffs' loss, and that the making and furnishing of the same was delayed at the request of the defendant.

XI. That, before the making of said proofs, to wit, on or about the 26th day of July, A. D. 1871, the defendant refused to pay the aforesaid loss, and ignored their liability thereon for said loss or damage, and claimed that it was not liable thereon, and has, at all times since, ignored their liability thereon therefor, and claimed that it was not liable thereon therefor, and refused to pay the same.

22 XII. That the said defendant has not paid said loss or any portion thereof.

XIII. That the plaintiffs are the holders and owners of said claim and demand, and were at the time of the commencement of this suit, and that there is due to them thereon the sum of thirty-five hundred dollars, with interest thereon from the time the same became due & payable as aforesaid.

XIV. That, at the time of the execution and delivery of said policy, they had not, nor have they had at any time since, any other policy of insurance on the said property so insured, or any part thereof, except a policy thereon in the Insurance Company of North America, of Philadelphia, for fifty-five hundred dollars, which was issued and delivered at the same time as def't's policy, and by the same agents, and with the full knowledge and consent of the defendant.

XV. That the plaintiffs have duly performed all the conditions of said contract, to wit, of said policy of insurance on their part,

23 to wit, on the part of the plaintiffs.

Wherefore, the plaintiffs demand judgment against the defendant for thirty-five hundred dollars, with interest thereon from the 26th day of July, A. D. 1871.

GABE BOUCK,
Attorney for Plaintiffs.

STATE OF WISCONSIN,
Winnebago County, ss:

John F. Morse and Charles C. Paige, being each duly sworn, on his oath saith that he is one of the plaintiffs named in the foregoing complaint; that he has heard the foregoing complaint read and knows the content' thereof, and that the same is true, to his own knowledge, except as to those matters and things therein stated to be upon information and belief, and as to those matters and things he believes it to be true.

JOHN F. MORSE.
CHARLES C. PAIGE.

Sworn and subscribed to before me this 1st day of November, A. D. 1871.

GEO. C. FITZANNORS,
Notary Public.

24 In circuit court, Winnebago County, State of Wisconsin.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of New York, defendants.

The State of Wisconsin to the defendant above named:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber, at his office in the city of Oshkosh, in the county of Winnebago, State of Wisconsin, within twenty days after the services hereof, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated at Oshkosh, Wis., the first day of November, A. D., 1871.

GABE BOUCK,
Pl'ffs' Att'y.

25 STATE OF WISCONSIN,
Winnebago County, ss:

We, S. P. Gary and L. D. Harmon, comprising the firm of Gary and Harmon, insurance agents of the city of Oshkosh, do hereby certify that, at the city of Oshkosh, in the county of Winnebago aforesaid, the within summons and complaint was served upon us, by copies being then and there left with us.

Dated Nov. 1, A. D. 1871.

SAM'L P. GARY.
L. D. HARMON.

Filed Dec. 5, 1871.

H. B. HARSHAW, *Clerk.*

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of New York, defendants.

Please to take notice that we are retained for the defendant in the above-entitled action, and hereby enter the appearance of the said defendant therein, and notices may be served upon us at our offices in Excelsior Building, in the city of Milwaukee, Wisconsin.

FINCHES, LYNDE AND MILLER,
Attorneys for Defendant, The Home Insurance Company of the City of New York.

To G. BOUCK, Esq.,
Attorney for Plaintiffs.
Dated Milwaukee, Nov. 3d, 1871.

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of New York, defendant.

The petition of the above-named defendant, The Home Insurance Company of the City of New York, respectfully shows unto this
27 honorable court that the above-named plaintiffs, John F. Morse and Charles C. Paige, have commenced a suit against your petitioner in the circuit court in and for the county of Winnebago, in the State of Wisconsin, and which said suit is now pending in the said court.

And your petitioner further shows and alleges that, at the time of the commencement of the said suit, it was a corporation, duly created under the laws of the State of New York, and having its principal office and place of business in the city of New York, in said State, and a citizen of said State; and that the said plaintiffs and each of them were at the same time, and still are, citizens and residents of the State of Wisconsin; and that the amount in dispute in the said suit between the said plaintiffs and your petitioner exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner alleges that it is now ready and willing and hereby offers good and sufficient sureties that it will enter its appearance in the circuit court of the United States in and for the eastern district of Wisconsin, on the first day of its session, copies of said process against it, and even for its then appearing and entering
28 special bail in the cause, if special bail was originally requisite therein.

Your petitioner therefore prays that the said above-entitled cause now pending in the circuit court in and for Winnebago County, in State of Wisconsin, wherein the said John F. Morse and Charles C. Paige are plaintiffs and your petitioner is defendant, may, by the proper order of this court, be removed into the circuit court of the United States in and

for the eastern district of Wisconsin; that the sureties offered may be accepted, and that all proceedings in the said cause in the said circuit court in and for Winnebago County, in the State of Wisconsin, may be staid, or that your petitioner may have such other or further or different relief as to this honorable court may appear just and equitable; and your petitioner will ever pray, &c.

The Home Insurance Company of the City of New York.
By FINCHES, LYNDE & MILLER,
Its Attorneys.

STATE OF WISCONSIN,
Milwaukee County, ss:

J. A. Helfenstein, being duly sworn, says that he has heard
29 read the foregoing petition, and knows the contents thereof; that he is the agent of the said petitioner, The Home Insurance Company of the City of New York, and makes this affidavit as its agent; and that the said petition is true in substance and in fact.

J. ALBERT HELFENSTEIN.

Subscribed and sworn to before me this 3d day of November, A. D. 1871.

L. A. WARREN,
Not'y Pub. Mil. Co., Wis.

Know all men by these presents that we, J. Albert Helfenstein and William T. Bonniwell, of Milwaukee, Wis., are held and firmly bound unto John F. Morse and Charles C. Paige, in the sum of one thousand dollarrs, lawful money of the United States of America, to be paid to the said John F. Morse and Charles C. Paige, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 3d day of November, A. D. 1871.

30 Whereas the said John F. Morse and Charles C. Paige have commenced a suit in the circuit court in and for the county of Winnebago, in the State of Wiconsin, against The Home Insurance Company of the City of New York, and which said suit is still pending in said court; and whereas the said The Home Insurance Company of the City of New York is about to file a petition in the said cause, asking for an order to remove the said cause into the circuit court of the United States in and for the eastern district of Wisconsin, in accordance with the act of Congress in such case made and provided, on the ground that the plaintiffs in the said suit are citizens of the State of Wisconsin, and the defendant is a corporation duly created under the laws of the State of New York, and having its principal office and place of business in the City of New York, and is a citizen of said State; and that the amount in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, and the said obligees have consented to become sureties on the said bond: Now, therefore, the condition of this obligation is such, that if the said The Home Insurance Company of the City of
31 New York shall enter in the said circuit court of the United States in and for the said eastern district of Wisconsin, on the first day of its session, copies of the process against it, and also that it will then and there appear in said court, and put in special bail if special bail was originally requisite therein, then this obligation shall be void; else valid.

J. A. HELFENSTEIN. [SEAL.]
W'M T. BOMNIWELL. [SEAL.]

STATE OF WISCONSIN,
Milwaukee County, ss:

J. A. Helfenstein and William T. Bonniwell, each for himself, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above all set-offs and exceptions; and further saith not.

J. A. HELFENSTEIN.
W'M T. BOMNIWELL.

Subscribed and sworn to before me this 3d day of November, A. D. 1871.

L. A. WARREN,
Not'y Pub. Mil. Co., Wis.

32 Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE CITY of New York, defendant.

Upon the papers, records, and proceedings in this cause, and upon the petition and affidavit thereto, the bond and notice of retainer and entry of appearance in the above-entitled cause, (copies of which said petition, affidavit, bond, notice of retainer, and entry of appearance are herewith served upon you,) it is ordered that the said plaintiffs show cause before this court, at the court-house in the city of Oshkosh, on Tuesday, the 5th day of December, A. D. 1871, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the prayer of the said petition should not be granted, and why the sureties of said bond should not be accepted, and all proceedings
33 in this cause be stayed in the circuit court of Winnebago County, and this cause removed to the circuit court of the United States in and for the eastern district of Wisconsin, or for such other or further relief in this cause, as the court may grant in the premises.

And it is further ordered that said plaintiffs show cause before me, at my office in the city of Oskkosh, on the 10th day of November, A. D. 1871, at ten o'clock in the forenoon of that day, why all proceedings in the said cause should not be stayed on the part of the plaintiffs until the hearing of the said petitioner; and, in the mean time, let all proceedings in the said cause be stayed until the said 10th day of November, 1871.

And it is further ordered that a copy of this order be served on the attorneys of the plaintiffs on or before the 7th day of November A. D. 1871.

C. D. CLEERLAND,
Court Commissioner in & for Winnebago County, Wis.

Service of copy admitted.

GABE BOUCK,
Att'y for Pl'ffs.

Filed Nov. 6, 1871.

H. B. HARSHAW, *Clerk.*

34 Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE CITY of New York, defendant.

Said defendant, by Finches, Lynde, and Miller, its attorneys, answer the complaint of the said plaintiffs, and says that it admits the first, second, third, and fourth paragraphs of the said complainant, as alleged.

Said defendant admits that, on the 22d day of June, 1871, the said steamboat Diamond took fire, but as to whether her tackle, apparel, furniture, machinery, and supplies therein were totally destroyed, or the hull thereof damaged, as alleged in said complaint, it has no knowledge or information sufficient to form a belief.

Said defendant has no knowledge or information sufficient to
35 form a belief as to the allegations contained in the seventh paragraph of the said complaint.

Said defendant admits the allegations in the eig'th paragraph of the complaint down to and including the words "or usurped power," and as to each and all of the other and remaining allegations in the said eighth paragraph, it, the said defendant, has no knowledge or information sufficient to form a belief.

Said defendant, as to the allegations in the eighth and one-half paragraph of the said complaint, says it has no knowledge or information sufficient to form a belief.

Said defendant admits the ninth, tenth, eleventh, and twelfth paragraphs in the said complaint, and all of the allegations in the thirteenth paragraph down to and including the words "this suit," but denies that it is indebted to the plaintiff as alleged in the said paragraph.

Said defendant admits the allegations in the fourteenth paragraph of the said complaint.

Said defendant, as to all of the allegations contained in the fifteenth paragraph of the said complaint, says that it has no knowledge or information sufficient to form a belief.

36 And for a further and separate answer to the said complaint the said defendant alleges, on information and belief, that the said policy of insurance mentioned in the plaintiff's complaint was made, executed, and delivered to the plaintiffs to insure against loss or damage by fire the steamboat Diamond; that said steamboat Diamond, at the time of the obtaining of the said insurance, was engaged in the business of transporting merchandise and passengers on the navigable waters of the United States, to wit, on the waters of the Fox and Wolf Rivers.

And said defendant alleges, on information and belief, that the said Fox and Wolf Rivers are navigable waters of the United States, and that passengers and merchandise destined to places and States other then the State of Wisconsin are transported by boats on the said Fox and Wolf Rivers, and that said Fox and Wolf Rivers do form a continuous line of navigation from the waters of Lake Michigan to the Mississippi River, and that merchandise from points and places other then the State of Wisconsin is carried on said rivers.

And said defendant alleges, on information and belief, that the said steamer Diamond was engaged in carrying passengers and mer-
37 chandise on the said Fox and Wolf Rivers which had come from

places and States other then within the State of Wisconsin; and that the said steamer Diamond did also carry passengers and merchandise from points in the State of Wisconsin which were destined for ports and places other then within the State of Wisconsin.

And said defendant alleges, on information and belief, that while the said steamer Diamond was so engaged in trade and commerce on the said Fox and Wolf Rivers, and engaged in carrying passengers and merchandise destined to States other then the State of Wisconsin, and during the life of the said policy of insurance, she was damaged by fire which originated on board said steamer; and said defendant alleges, on information and belief, that the cause of action mentioned and described in the complaint in this cause is by reason and on account of the aforesaid fire, and is to recover damages by reason thereof, and is founded on the policy of insurance, a copy of which is set out in the complaint in this cause.

And the said defendant alleges, on information and belief, that the said cause of action upon the said policy of insurance is a cause
38 of action civil and maritime, and that the district court of the United States in and for the eastern district of Wisconsin has exclusive and original cognizance of the subject-matter of this action, and that the circuit court in and for Winnebago County has no jurisdiction to hear or determine the cause of action in this cause: Wherefore said defendant demands judgment that the complaint of the said plaintiff be dismissed.

FINCHES, LYNDE AND MILLER.
Att'ys for Def't.

STATE OF ILLINOIS,
Cook County, ss:

Daniel Morse, being duly sworn, deposes and says that he is the agent of the above-named defendant, and makes this verification for and on behalf of the said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes to be true.

39 DANIEL MORSE.

Subscribed and sworn to before me this ninth day of December, A. D. 1871.

[L. S.] PHILIP A. HOYNE,
Commissioner for Wisconsin, residing in Chicago, Illinois.

Filed Dec. 12th, 1871.

H. B. HARSHAW.

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE
against
THE HOME INSURANCE COMPANY OF THE CITY of New York.

The order to show cause why the prayer of the petition of the defendant to remove the cause into the circuit court of the United States in and for the eastern district of Wisconsin having this day been brought on for argument, and after hearing H. M. Finch, esq., of counsel for the defendant, and Gabriel Bouck, esq., of the plaintiff:

40 It is ordered that the said prayer of the said petition be, and the same is hereby, denied, and the said order to show cause is dismissed.

Dated December 5th, 1871.

D. J. PULLING,
Circuit Judge.

And now comes the said defendant, by Finches, Lynde & Miller, its att'ys, and here excepts to the above order, and to the refusal of the said court to remove the said cause in pursuance of the prayer of the said petition.

FINCHES, LYNDE & MILLER,
Att'ys for Def't.

DEC. 5TH, 1871.

Circuit court, Winnebago County, State of Wisconsin.

JOHN F. MORSE ET ALS.
vs.
THE HOME INSURANCE COMPANY OF THE CITY of New York.

And now comes the said defendant, by Finches, Lynde & Miller, its attorneys, and moves the court now here that, upon giving a
41 proper bond with good and sufficient sureties to pay any final judgment which the plaintiff in this cause may sustain on account or by reason of the matters in suit, that all proceedings in this cause be stayed pending an appeal from the said order to the supreme court.

FINCHES, LYNDE & MILLER.
Att'ys for Def't.

The above-entitled motion having been argued by H. M. Finch, esq., for def'ts, and G. Bouck, esq., for plaintiff, it is ordered that said motion be, and the same is hereby, denied.

Dated Dec. 5th, 1871.

D. J. PULLING, *Judge.*

And now comes the said defendant, by Finches, Lynde & Miller, and now here excepts to the order denying the said motion to stay proceedings in said above-entitled cause.

Dec. 5th, 1871.

FINCHES, LYNDE & MILLER,
Att'ys for Def't.

Service of copy admitted Dec. 5th, 1871.

GABE BOUCK,
Pff's Att'y.

Filed Dec. 5th, 1871.

H. B. HARSHAW, *Clerk.*

42 [Blank number 13.]

STATE OF WISCONSIN,
Office of Secretary of State,
Department of Insurance—Fire and Marine:

Know all men by these presents that The Home Insurance Company of the City of New York, in the State of New York, having been ad-

mitted, or having applied for admission, to transact business in the State of Wisconsin, in conformity with the laws thereof, does hereby make, constitute, and appoint Henry S. Durand, esq., of the city of Racine, county of Racine, its true and lawful attorney in and for the State of Wisconsin, on whom all process of law, whether mesne or final, against said insurance company, may be served in any action or special proceedings against said company, in the State of Wisconsin, subject to and in accordance with all the provisions of the statutes and laws of said State of Wisconsin now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto. And the said attorney is hereby duly authorized and empowered as the agent of said company to receive and accept service of process in all cases as provided for by the laws of the State of Wisconsin, and
43 such service shall be deemed valid personal service upon said company. This appointmemt is to continue in force for a period of time and in the manner provided by the statutes of the State of Wisconsin, and until another attorney shall be duly and regularly substituted; and said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the act of said company into the United States circuit or Federal courts.

In witness whereof the said company, in accordance with a resolution of its board of directors, duly passed on the twenty-second day of June, A. D. 1870, (a certified copy of which is hereto attached,) has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its president and secretary, at the city of New York, in the State of New York, on the 25th day of June, A. D. 1870.

[CO. SEAL.] CHARLES J. MARTIN,
President.

J. H. WASHBURNE, *Secretary.*

[U. S. rev. stamp 50 cts.]

44 STATE OF NEW YORK,
County of New York, ss:

On this 25th day of June, A. D. 1870, before me, the subscriber, a commissioner for the State of Wisconsin, duly appointed to take the proof and acknowledgement of deeds and other instruments, came Charles J. Martin, president, and John H. Washburne, secretary of The Home Insurance Company, to me personally known to be the individuals described in, and who executed the preceeding instrument, and they each duly acknowledged the execution of the same; and, being by me each sworn, severally, and each for himself, deposeth and saith that they are the said officers of the Insurance Company aforesaid, and that the seal affixed to the preceeding instrument is the corporate seal of said company; and that said corporate seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of New York, the day and year first above written.

[SEAL.] THO'S F. GOODRICH,
Commissioner for Wisconsin, in New York.

45 *Certified copy of a resolution duly passed by the board of directors of The Home Insurance Company on the 22nd day of June, A. D.* 1870.

At a meeting of the board of directors of The Home Insurance Company, held on the twenty-second day of June, A. D. 1870, at the office

of the company, a quorum of said board was present, and, on motion, the following resolution was duly passed by said board:

"*Resolved*, That this company having been admitted, or having applied for admission, to transact business in State of Wisconsin, in conformity with the laws thereof, does hereby authorize the president and secretary, under the corporate seal of the company, to make, constitute, and appoint Henry S. Durand, esq., of the city of Racine, its true and lawful attorney, in and for the State of Wisconsin, on whom all process of law, whether mesne or final, against said insurance company may be served in any action or special proceedings against said company in the State of Wisconsin, subject to and in accordance with all the provisions of all the statutes and laws of said State of Wisconsin
46 now in force, and such other acts as may be hereafter passed, amendatory thereof and supplementary thereto; and the said attorney is duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases as provided by the laws of the State of Wisconsin, and such service shall be deemed valid personal service upon said company; said appointment is to continue in force for the period of time and in the manner provided by the statutes of the State of Wisconsin, and until another attorney shall be duly and regularly substituted."

I hereby certify that the above is a correct copy of the vote or resolution of the directors of the said company authorizing the appointment of an attorney for the State of Wisconsin.

J. H. WASHBURNE,
Secretary.

[U. S. rev. stamp, 5-c't.]

Filed July 1st, 1870.

L. C. BREESE,
Secretary of State, Wis.

47 STATE OF WISCONSIN,
Secretary's Office, ss:

The secretary of state of the State of Wisconsin hereby certifies that the foregoing has been compared with the appointment of attorney in Wisconsin, by The Home Ins. Co. of N. Y., now on file in this office, and that the same is a true and correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol in Madison, this eighth day of November, A. D. 1871.

[L. S.]

JOHN S. DEAN,
Ass't Secretary of State.

Filed Dec. 5th, 1871.

H. B. HARSHAW, *Clerk.*

48 In circuit court, Winnebago County. At December term, A. D. 1871, held at the court-house in the city of Oshkosh, Winnebago Co., Wis.

JOHN F. MORSE & CHARLES C. PAIGE *agt.* THE HOME INSURANCE COMPANY OF THE City of New York.

Present, Hon. D. J. Pulling, judge.

At this term this case duly coming on for trial before the court & the judge thereof, & a jury duly empannelled & sworn, &c., and the jury having found for the plaintiffs and assessed their damages at three thousand five hundred & fifty-seven $\frac{82}{100}$ dollars, and the verdict having been duly rendered, entered, and recorded, on motion of Gabe Bouck, attorney for the plaintiffs, it is adjudged that the plaintiffs, John F. Morse & Charles C. Paige, have & recover of the defendant, The Home Insurance Company of the City of New York, the sum of three thousand five hundred & fifty-seven dollars and eighty-two cents, together with the sum of sixty-three dollars and eleven cents for
49 their costs and disbursements in this action, amounting in the aggregate to the sum of three thousand six hundred and twenty dollars & ninety-three cents.

Dated December the 22d, A. D. 1871.

H. B. HARSHAW, *Clerk.*

GABE BOUCK,
Plaintiffs' Attorney.

Filed Dec. 22, 1871.

H. B. HARSHAW, *Clerk.*

In circuit court, Winnebago County.

JOHN F. MORSE ET AL.
against
THE HOME INSURANCE CO. OF NEW YORK.

STATE OF WISCONSIN, *Winnebago County, ss:*

CHARLES C. PAIGE, being duly sworn, on his oath saith:

1st. That he is one of the plaintiffs in this action, and that the persons hereinafter named actually attended this court at the December term, A. D. 1871, thereof as witnesses for the plaintiffs therein.

2nd. That, to attend as such witnesses in this case as aforesaid, at said term, the said witnesses actually travelled the number of
50 miles, and as such witnesses actually attended at said term the number of days as hereinafter set forth opposite to their names; that the distance so travelled is computed by the usual traveled route from the place of residence of each of the said witnesses to the place where said court was held.

3d. That the following is a correct statement of the number of miles travelled as aforesaid, the number of days' attendance at court as aforesaid at said term, and the place of residence of each of the said witnesses at the time he attended as such witness as aforesaid.

Names.	Town, city, or village.	State.	Miles.	Days.
John S. Everitt	Oshkosh	Wis.	1	5
A. W. Farrand	"	"	1	5
Asa Rogers	"	"	1	5
T. N. Lake	Winneconne	"	14	5
A. C. Maire	Oshkosh	"	1	5
Ira Moody	"	"	1	5
E. F. Burnham	"	"	1	5
L. D. Harman	"	"	1	5
S. P. Garry	"	"	1	5

4th. That said witnesses were each material and necessary witnesses for the plaintiffs in this action at said term, and attended as such witnesses in good faith.

51 CHARLES C. PAIGE.

Subscribed and sworn to before me this 22nd day of December, A. D. 1871.

J. W. MURDOCK,
Notary Public, Wis.

Filed Dec. 22nd, 1871.

H. B. HARSHAW, *Clerk.*

In circuit court, Winnebago County.

JOHN F. MORSE ET AL.
agt.
THE HOME INSURANCE COMPANY OF NEW York City.

Atty's fees	$25 00
Clerk's fees	8 00
Certificate of secretary of state	2 50
Jury fee	3 00
State tax	1 00
Sheriff	45
Witnesses	23 16
	$63 11

We consent that the costs & disbursements be taxed at sixty-three $\frac{11}{100}$ dollars.

Dec. 22nd, A. D. 1871.

52 FINCHES, LYNDE & MILLER,
Deft's Att'ys.

Costs taxed Dec. 22nd, 1871, at $63.11.

H. B. HARSHAW, *Clerk.*

Filed Dec. 22nd, 1871.

H. B. HARSHAW, *Clerk.*

Roll filed & judg't doc. Dec. 22nd, 1871.
Judg't doc., vol.
App. "
Judg't-book VI, p. 80.

H. B. HARSHAW.

In circuit court, Winnebago County.

JOHN F. MORSE & CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF NEW York City, def't.

53 Be it remembered that, heretofore, to wit, on the 3d day of November, A. D. 1871, the said defendant duly entered its appearance in the said cause, and, at the same time, filed or served its order and petition in the words and figures following, to wit:

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of York, defendants.

Please to take notice that we are retained for the defendant in the above-entitled action, and hereby enter the appearance of the said defendant therein, and notice may be served upon us at our offices in Excelsior Building, in the city of Milwaukee, Wisconsin.

FINCHES, LYNDE & MILLER,
Attorneys for Defendant, The Home Insurance Company of the City of New York.

To G. BOUCK, Esq.,
Attorney for Plaintiffs.

Dated Milwaukee, Nov. 3d, 1871.

54 Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of New York, defendants.

The petition of the above-named defendant, The Home Insurance Company of the City of New York, respectfully shows unto the honorable court that the above-named plaintiffs, John F. Morse and Charles C. Paige, have commenced a suit against your petitioner in the circuit court in and for the county of Winnebago, in the State of Wisconsin, and which said suit is now pending in the said court.

And your petitioner further shows and alleges that, at the time of the commencement of the said suit, it was a corporation duly created under the laws of the State of New York, and having its principal office and place of business in the city of New York, in said State, and a
55 citizen of said State; and that the said plaintiffs, and each of them, were at the same time and still are citizens and residents of the State of Wisconsin; and that the amount in dispute in the said suit between the said plaintiffs and your petitioner exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner alleges that it is now ready and willing, and hereby offers good and sufficient sureties that it will enter its appearance in the circuit court of the United States in and for the eastern district of Wisconsin on the first day of its session, and also of its then appearing and entering a special bail in the cause if special bail was originally requisite therein.

Your petitioner therefore prays that the said above-entitled cause

now pending in the circuit court in and for Winnebago County, in the State of Wisconsin, wherein the said John F. Morse and Charles C. Paige are plaintiffs, and your petitioner is defendant, may, by the proper order of the court, be removed into the circuit court of the United States in and for the eastern district of Wisconsin; that the sureties offered may be accepted, and that all proceedings in the said
56 cause in the said circuit court in and for Winnebago County, in the State of Wisconsin, may be stayed, or that your petitioner may have such other or further or different relief as to this honorable court may appear just and equitable; and your petitioner will ever pray, &c.

The Home Insurance Company of the City of New York,
By FINCHES, LYNDE & MILLER,
Its Attorneys.

STATE OF WISCONSIN,
Milwaukee County, ss:

J. A. Helfenstein, being duly sworn, says that he has heard read the foregoing petition and knows the contents thereof; that he is the agent of the said petitioner, The Home Insurance Company of the City of New York, and make this affidavit as its agent, and that the said petition is true in substance and in fact.

J. ALBERT HELFENSTEIN.

Subscribed and sworn to before me this 3d day of November, A. D. 1871.

L. A. WARREN,
Notary Publ., Mil. Co., Wis.

57 Know all men by these presents that we, J. Albert Helfenstein and William T. Bonniwell, of Milwaukee, Wis., are held and firmly bound unto John F. Morse and Charles C. Paige in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said John F. Morse and Charles C. Paige, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 3d day of November, 1871.

Whereas the said John F. Morse and Charles C. Paige have commenced a suit in the circuit court in and for the county of Winnebago, in the State of Wisconsin, against The Home Insurance Company of the City of New York, and which said suit is still pending in said court; and whereas the said The Home Insurance Company of the City of New York is about to file a petition in the said cause, asking for an order to remove the said cause into the circuit court of the United States in and for the eastern district of Wisconsin, in accordance with the act of Congress in such case made and provided, on the ground that the plaintiffs in the said suit are citizens of the State of
58 Wisconsin, and the defendant is a corporation duly created under the laws of the State of New York, and having its principal office and place of business in the city of New York, and is a citizen of said State; and that the amount in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, and the said obligors have consented to become on the said bond: Now, therefore, the condition of this obligation is such, that if the said The Home Insurance Company of the City of New York shall enter in the said circuit court of the United States

in and for the said eastern district of Wisconsin, on the first day of its session, copies of the proof against it, and also that it will then and there appear in said court and put in special bail if special bail was originally requisite therein, then this obligation shall be void; else valid.

[SEAL.] J. A. HELFENSTEIN.
[SEAL.] W'M T. BONNIWELL.

STATE OF WISCONSIN,
Milwaukee County, ss:

J. A. Helfenstein and William T. Bonniwell, each for himself, being duly sworn, deposes and says that he is worth the sum of one hundred dollars over and above all set-offs and exemptions; and further saith not.

59

J. A. HELFENSTEIN.
W'M T. BONNIWELL.

Subscribed and sworn to before me this 3d day of November, A. D. 1871.

L. A. WARREN,
Notary Pub., Mil. Co., Wis.

Circuit court, Winnebago County.

JOHN F. MORSE AND CHARLES C. PAIGE, plaintiffs,
against
THE HOME INSURANCE COMPANY OF THE City of New York, defendants.

Upon the papers, records, and proceedings in this cause, and upon the petition and affidavit thereto, the bond and notice of retainer and entry of appearance in the above-entitled cause, (copies of which said petition, affidavit, bond, notice of retainer, and entry of appearance, are herewith served upon you,) it is ordered that the said plaintiffs show cause before the court at the court-house in the city of Oshkosh, on Tuesday, the 5th day of December, A. D. 1871, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the prayer of the said petition should not be granted, and why the sureties of said bond should not be accepted, and all proceedings in this cause be stayed in the circuit court of Winnebago County, and this cause removed to the circuit court of the United States in and for the eastern district of Wisconsin, or for such other or further relief in the cause as the court may grant in the premises.

60

And it is further ordered that said plaintiffs show cause before me, at my office, in the city of Oshkosh, on the 10th day of November, A. D. 1871, at ten o'clock in the forenoon of that day, why all proceedings in this cause should not be stayed on the part of the plaintiffs until the hearing of the said petition, and in the mean time let all proceedings in the said cause be stayed until the said 10th day of November, 1871.

And it is further ordered that a copy of this order be served on the attorneys of the plaintiffs on or before the 7th day of November, A. D. 1871.

61

Court Commissioner, Winnebago County, Wisconsin.

Upon the hearing of the said motion and petition, the defendant offered and filed the following in opposition thereto:

STATE OF WISCONSIN,
Office of Secretary of State,
Department of Insurance—Fire and Marine:

[Blank number 13.]

Know all men by these presents that The Home Insurance Company of the City of New York, in the State of New York, having been admitted, or having applied for admission, to transact business in the State of Wisconsin in conformity with the laws thereof, does hereby make, constitute, and appoint Henry S. Durand, esq., of the city of Racine, county of Racine, its true and lawful attorney in and for the State of Wisconsin, on whom all process of law, whether mesne or final, against said insurance company may be served in any action or special
62 proceedings against said company in the State of Wisconsin, subject to, and in accordance with, all the provisions of the statutes and laws of said State of Wisconsin now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto; and the said attorney is hereby duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases, as provided for by the laws of the State of Wisconsin, and such services shall be deemed valid personal service upon said company.

This appointment is to continue in force for the period of time and in the manner provided by the statutes of the State of Wisconsin, and until another attorney shall be duly and regularly substituted; and said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the act of said company into the United States circuit or Federal courts.

In witness whereof the said company, in accordance with a resolution of its board of directors, duly passed on the twenty-second
63 day of June, A. D. 1870, (a certified copy of which is hereto attached,) has to these presents affixed its corporate seal and caused the same to be subscribed and attested by its president and secretary, at the city of New York, in the State of New York, on the twenty-fifth day of June, A. D. 1870.

[CO. SEAL.] CHARLES J. MARTIN,
President.

J. H. WASHBURNE, *Secretary.*

[U. S. rev. stamp, 50c.]

STATE OF NEW YORK,
County of New York, ss:

On this 25th day of June, A. D. 1870, before me, the subscriber, a commissioner for the State of Wisconsin, duly appointed to take the proof and acknowledgment of deeds and other instruments, came Charles J. Martin, president, and John H. Washburne, secretary, of The Home Insurance Company, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of the same; and
64 being by me each sworn, severally, and each for himself, depo-

seth and saith that they are the said officers of the insurance company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company; and that said corporate seal and their signatures, as such officers, were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of New York, the day and year first above written.

[SEAL.] THO'S F. GOODRICH,
Commissioner for Wisconsin, in New York.

Certified copy of a resolution duly passed by the board of directors of The Home Insurance Company on the 22nd day of June, A. D. 1870.

65 At a meeting of the board of directors of The Home Insurance Company held on the twenty-second day of June, A. D. 1870, at the office of the company, a quorum of said board was present, and, on motion, the following resolution was duly passed by said board:

"*Resolved*, That this company having been admitted, or having applied for admission, to transact business in the State of Wisconsin, in conformity with the laws thereof, does hereby authorize the president and secretary, under the corporate seal of the company, to make, constitute, and appoint Henry S. Durand, esq., of the city of Racine, its true and lawful attorney in and for the State of Wisconsin, on whom all process of law, whether mesne or final, against said insurance company, may be served in any action or special proceedings against said company in the State of Wisconsin, subject to and in accordance with all the provisions of all the statutes and laws of said State of Wisconsin now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto; and the said attorney is duly authorized and empowered, as the agent of said company, to receive and accept ser-

66 vice of process in all cases as provided by the laws of the State of Wisconsin, and such service shall be deemed valid personal service upon said company. Said appointment is to continue in force for the period of time and in the manner provided by the statutes of the State of Wisconsin, and until another attorney shall be duly and regularly substituted."

I hereby certify that the above is a correct copy of the vote or resolution of the directors of the said company authorizing the appointment of an attorney for the State of Wisconsin.

J. H. WASHBURNE,
Secretary.

[U. S. rev. st'p.]

Filed July 1st, 1870.

D. BREESE,
Secretary of State, Wis.

STATE OF WISCONSIN.
Secretary's Office, ss:

The secretary of state of the State of Wisconsin hereby certifies

67 that the foregoing has been compared with the appointment of attorney in Wisconsin by The Home Ins. Co. of N. Y., now on file in this office, and that the same is a true and correct transcript therefrom and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol in Madison, this eighth day of November, A. D. 1871.

[GREAT SEAL OF STATE.] JOHN S. DEAN,
Asst. Secretary of State.

STATE OF WISCONSIN,
Winnebago County, ss:

I, H. B. Harshaw, clerk of the circuit court in and for said county and State, do hereby certify that I have compared the foregoing copys of affidavit of Charles J. Martin & J. H. Washburne, certified copy of resolution of board of directors of Home Ins. Co., and secretary of state's certificate thereto attached, on file and of record in my office, in a certain cause entitled Jno. F. Morse, et al. vs. Home Insurance Company of City of New York, and that it is a correct transcript therefrom.

In testimony whereof I have hereto set my hand and the seal of said court this 22nd day of December, A. D. 1871.

[L. S.] H. B. HARSHAW, *Clerk.*

68 And thereupon, and on the hearing of the said application, the prayer of the said petition was denied, and the said circuit court did then and there refuse to accept the surety and to remove this said cause into the circuit court of the United States in and for the eastern district of Wisconsin; and to which ruling and decision said defendant did then and there duly except.

And afterwards said defendant filed its answer, and the issue made by the answer came on for trial; and the plaintiffs, to maintain the issue on their part, called, as a witness, A. F. MAIZE, who, being duly sworn, testified as follows, to wit:

That, in the month of June, 1871, and before the steamboat Diamond was burned, he was its captain; that said steamboat ran from Oshkosh, via Winneconne, to Berlin, on the Wolf and Fox Rivers; that said steamer was burned on the 22nd day of June, 1871; that, at the time she was burned, she was laying at the wharf in Berlin; that he did not know how the fire occurred; that the fire occurred in the night time; that the hull of the vessel was not entirely destroyed; the furniture and equipments were entirely destroyed by the fire, and also the ma-
69 chinery. I brought what was left to Oshkosh, and in the same condition in which it was left by the fire.

Cross-examined:

Had been captain of the said steamer ever since she came out in the spring. The steamboat came out in the spring of 1871. I could not tell exactly how many trips she had made. She made one trip a day—a round trip. She commenced making her trips in the month of May, 1871, and she continued making regular trips from that time on until she was burned on the Fox and Wolf Rivers, and I was captain of her during all that time.

And thereupon the counsel for said defendants did propose to ask the said witness this question: Had you taken out license as captain of that vessel? which said question was objected to as not proper cross-examination, and as irrelevant and incompetent under the pleadings. Objection sustained and question excluded; and to which said ruling and decision the said defendant did then and there except.

And said defendant, by its said counsel, did then and there offer to prove by said witness that he was not licensed as a captain in accordance with the provisions of the act of Congress of the United States entitled "An act to provide for the better security of life on board
70 of vessels propelled in whole or in part by steam, and for other purposes," approved February 28th, 1871.

And to prove which said offer, said plaintiff, by his counsel, did then and there object as irrelevant and incompetent under the pleadings, and as not proper cross-examination; which objection was sustained, and the facts to sustain said offer excluded; and to which said ruling and decision said defendant did then and there except.

And the witness testified that the distance from Oshkosh to Berlin, by the way of Winneconne, was about 35 miles, and that the steamboat Diamond was used in carrying passengers and freight during the season of 1871, and up to the date she took fire. And thereupon the counsel for the defendant propounded to the witness this question: "Was that steamboat enrolled and licensed for the coasting trade during the year 1871?" which question was objected to as not proper cross-examination and as irrelevant and incompetent; and the objection was then and there sustained, and the question excluded; and to which ruling and decision said defendant did then and there except.

Re-examined:

I was on board of the boat at the time the fire took place. It
71 was about two o'clock in the morning that the fire took place.

Plaintiff C. C. PAIGE was called and sworn as a witness, and testified that the amount of damage was the sum of $8,478.13. This was exclusive of anything excepted in the policy. The witness also gave a detailed statement of the damage & loss by the destruction of said boat by fire as aforesaid, having first sworn himself a competent witness to testify as to the extent of loss and damage: that, from the time the steamboat Diamond was built until she was burned, she was exclusively engaged in navigating Fox and Wolf Rivers, between Oshkosh and Berlin, and from Berlin to Oshkosh and return, and to Winneconne; that the plaintiffs built the steamboat Diamond; that he made up statement of the loss, and with an objection of the defendant; that no objection was made by defendant to the statement.

And thereupon the plaintiffs rested their case, and the above and foregoing was all of the evidence on the part of the plaintiffs.

And thereupon said defendant, by its counsel, did then and there move the said circuit judge to grant a non-suit for the reason that
72 the plaintiffs had not made out a case, and had not proved the case as alleged in the complaint; which motion was argued, and submitted, and denied; and to which said ruling and decision said defendant did then and there except.

And thereupon the defendants did recall as a witness the plaintiff, C. C. PAIGE, who testified that he was a part owner of said steamer Diamond; that said steamboat commenced to run on the Fox and Wolf Rivers about the first of May, 1871, perhaps the 8th or 10th of May; that steamboat was new at that time, made her first trip about that date.

And thereupon said defendant, by its counsel, propounded to the said witness the following question: "Had she been enrolled or licensed prior to setting out on that trip?" which question was objected to by plaintiffs as irrelevant and incompetent under the pleadings, and because,

if a defence, that the same cannot be made, the same must have been set up in answer; the objection sustained and the question excluded; and to which ruling and decision said defendant did then and there except.

And thereupon said defendant offered to prove under said question that the said steamboat was not enrolled and licensed as provided
73 by the act of Congress, 1871; which offer was objected to for the same reason by the counsel for the plaintiffs and the evidence excluded; and to which said ruling and decision said defendant, by its said counsel, did then and there except.

It was then admitted by the plaintiffs that the waters of the Fox River empty into Green Bay, and that Green Bay is water connecting with Lake Michigan, and Lake Michigan into Lake Huron, and Lake Huron into Lake Erie, and Lake Erie into Lake Ontario, and Lake Ontario into the River St. Lawrence, and the River St. Lawrence into the Atlantic Ocean; and that steamboats have navigated the Fox River from Oshkosh to Green Bay, and to points outside of the State of Wisconsin, carrying passengers and merchandise to points and places other then in the State of Wisconsin for the past fifteen years; and it was admitted that the steamboat Diamond carried both passengers and merchandise which came from outside of Wisconsin on the Fox and Wolf Rivers, between Oshkosh and Berlin.

And thereupon the counsel for the defendant propounded to said witness the following question: "What arrangements or facilities were there on the steamer Diamond, in the year 1871, for putting out
74 fires?" which question was objected to by the counsel for the plaintiffs as irrelevant and incompetent, and because, if the same was a defence, would not be shown under the pleadings; and said objection was then and there sustained and the question excluded; and to which said ruling and decision said defendant did then and there except.

And thereupon said defendant, by its said counsel, did then and there, under said questions, offer to prove that not any of the provisions of the act of Congress approved February 28th, 1871, were on board of said steamboat for the purpose of put'ing out fire; which evidence was then and there objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if a defence, could not be shown under the pleadings; the objection sustained and the evidence excluded; and to which said ruling and decision said defendant, by its said counsel, did then and there except.

It was admitted by the plaintiff that said steamboat Diamond had been engaged in carrying passengers and merchandise from Berlin to Oshkosh, on the Fox River, and nowhere else, except at the junc-
75 tion where she ran up to Winneconne and back to the mouth of the river, and that some of the passengers and merchandise carried by said steamer came from points outside of Wisconsin.

And thereupon defendants offered to prove by said witness that the plaintiffs were the owners of the steamboat Diamond, and, at the time of the obtaining of said policy of insurance and at the time of the loss, the said steamboat was used in the transportation of passengers and merchandise on the Fox and Wolf Rivers without complying with any of the provisions or conditions of the act of Congress entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam," approved February 28th, 1871.

Which evidence was objected to by the counsel for the plaintiffs on the ground that it was irrelevant and incompetent, and because, if a defence, the same could not be shown under the pleadings; which objection

was sustained and the evidence excluded; and to which said ruling and decision said defendant, by its counsel, did then and there except.

And said defendant offered and read in evidence the following
76 printed rules and regulations issued by the Government, adopted by the board of supervising of steam-vessels under the act of Congress approved February 28th, 1871:

All steamers are required to have fire-buckets and axes, as follows, viz:

All steamers under 500 tons, 20 buckets and 5 axes.

RULE 5. Additional steering apparatus must be provided for all steamers carrying passengers.

RULE 6. Fire-buckets, barrels, or tanks required by the act must be kept constantly filled with water, and in such positions on board steamers as shall be convenient for the extinguishment of fire.

RULE 7. All axes must be located so as to be readily found in time of need, and must not be used for general purposes, but kept in good condition.

All steamers of over fifty tons burden shall carry at least one chief engineer.

RULE 28. It shall be the duty of the master of every inspected steamer carrying passengers, when such steamer is under way, to cause to be prepared a station-bill for his own department, and one also
77 for the engineer's department, in which shall be assigned a post or station of duty for every person employed on board of such steamers in case of fire or other disaster; which station-bills shall be posted in the most conspicuous places on board for the observation of the crew. And it shall be the duty of such master or mate or officer next in command, once at least in each month, to call all hands to quarters and exercise them in the discipline and use of the fire-pumps and other apparatus for the safety of life on board of such vessel, and to see that all the equipments required by law are in complete working order for immediate use.

RULE 34. All steamers on western rivers which have their boilers so situated that sparks from the fires may be driven back among the freight or other combustible material, shall have a sheet-iron fender extending forward from the fire-doors not less than two feet at the height of the furnace fronts, and connecting with the same.

RULE 53. The pipes required by law on board of steamers to convey the steam from their boilers to the holds and the separate compartments of the same, except that portion set apart for cabins, shall in no case be less than one and a half inches in diameter, and the
78 branches leading to the several compartments of the hold of a vessel shall be supplied with valves, the handles of which shall be marked so as to indicate the compartments or parts of the vessel into which the pipes lead. These valves or their handles shall be placed in the most accessible part of the main deck of the vessel, and so arranged when possible that all can be inclosed in one box or casing, the door to which shall be plainly marked with the words "Steam fire-apparatus." When these pipes lead into the hold of a steamer having no compartments, or into a compartment of more than thirty feet in length, it shall extend the whole length of said hold or compartment, and be perforated with holes at every six feet of its length, and the aggregate area of all these perforations shall be equal to, but not to exceed, the area of the pipe. In this case the extreme end of the pipe must be closed.

RULE 54. Steamers required by law to be provided with double-act-

ing steam fire-pumps or their equivalents for throwing water, shall be allowed to select the same from any such as are recognized by the supervising inspectors as good and efficient pumps, and shall be pro-
79 vided according to their tonnage as follows, viz: For a steamer of two hundred tons burden and under, four inches stroke and two inches diameter of plunger, or its equivalent.

RULE 59. All steamers hereafter constructed navigating the ocean, sounds, lakes, bays, and rivers, shall have a clear space of not less than sixteen inches on all sides of the boilers, and at the back end of all such boilers there shall be a clear space of two feet, and slip-joints in steam-pipes shall in their working parts be made of copper or composition.

RULE 75. Steamers of one thousand tons and under, carrying passengers in the night time, navigating rivers, lakes, bays, or sounds, shall at all times, from sundown to sunrise, have a watchman on duty on each deck below the hurricane-deck, and all steamers of more than one thousand tons shall have two watchmen on the lower deck, one on the main deck and two on the state-room deck, and all steamers on western and southern rivers shall have an additional watchman on the hurricane-deck. All sea-going steamers shall have a watchman on duty at all times during the night in each cabin and in the steerage.

80 RULE 81. All the equipment of a steamer, such as buckets, axes, hose, boats, oars, rafts, life-preservers, floats, barrels, tanks, &c., shall be painted or branded with the name of the steamer to which they belong.

And thereupon said defendant offered to prove by said witness on the stand that the owners of the steamer Diamond did not comply with the provisions of said rules, or either of them; which evidence was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if a defence, could not be proved under the pleadings, and which objection was sustained and the evidence excluded; and to which said ruling and decision said defendant did, then and there, except.

And said defendant, by its said counsel, did, then and there, offer to give evidence that the said board of inspectors named as the fire-extinguishers to be carried on board of each vessel propelled in whole or in part by steam under said act of Congress approved February 28th, 1871, the Babcock Fire-Extinguisher and the National Fire-Extinguisher presented by J. E. Thompson, and that the steamboat Diamond did
81 not carry either of the said fire-extinguishers on board at the time of the fire; which evidence was objected to by the counsel of the plaintiffs for the same reason as above; the objection was sustained and the evidence was excluded; and to which said ruling and decision said defendant, by its counsel, did, then and there, except.

And thereupon the said counsel for the defendant did, then and there, ask the said witness the following question: "Did the steamboat Diamond, during the year 1871, carry a watchman?" which question was objected to by the counsel for the plaintiffs as irrelevant and incompetent, and because that, if the same was a defence, it cannot be shown under the pleadings; the objection was sustained and the evidence excluded; and to which ruling and decision said defendant did, then and there, except.

And said defendant did, then and there, under said question, offer to give evidence that said steamboat Diamond did carry a watchman during the year 1871, until the trip on which the fire took place, and that the owners discharged that watchman at or about that time, and that they had no watchman on board of the boat at the time of the fire.

82 And to the giving of which said evidence, said plaintiffs did, then and there, object as irrelevant and incompetent, and because, if the same was a defence, the same could not be shown under the pleadings; which objection was sustained, the evidence excluded; and to which ruling and decision said defendant did, then and there, except.

Said witness further testified that said steamboat Diamond would carry forty or 50 tons of freight, and, on an average, probably fifteen to twenty passengers.

And thereupon the counsel of the said defendant did ask said witness this question: "What number of crew did that steamboat carry during the year 1871?"

Which question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and the objection was sustained and question excluded; and to which said ruling and decision said defendant did, then and there, except.

And thereupon the said defendant, by its said counsel, did, then and there, ask the said witness this question: "Was the captain of the
83 steamboat Diamond licensed as a captain?" which said question was objected to by the counsel for the plaintiffs as irrelevant and incompetent, and because, if a defence, could not be shown under the pleadings; and which objection was then and there sustained and the question excluded; and to which said ruling and decision said defendant did, then and there, except.

And thereupon the counsel for said defendant did offer to put the following question to the said witness: "How many engineers, and what were their titles, on board of the steamer Diamond in 1871?"

Which said question was objected to as irrelevant and incompetent, and because, if a defence, could not be shown under the pleadings; and the said objection was sustained and the question excluded; and to which said ruling and decision said defendant did, then and there, except.

And thereupon said defendant, by its counsel, did, then and there, offer to put to said witness the following question: "Was the boiler on board of the steamer Diamond inspected by the Berlin inspector?" and to which said question the said plaintiff, by his said counsel, did, then and there, object as irrelevant and incompetent, and because,
84 if a defence, the same could not be shown under the pleadings; which objection was sustained and the question excluded; and to which said ruling and decision the said defendant did, then and there, except.

And thereupon the said defendant, by its counsel, did, then and there, ask the said witness the following question: "State to the jury how the ash-pan was constructed on board of said steamer Diamond?" which said question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and, if a defence, could not be shown under the pleadings; and which objection was sustained and the question excluded; and to which said ruling and decision said defendant did then and there except.

And thereupon said counsel for said defendant did, then and there, offer to ask the said witness the following question: "What provision was made on board of said steamboat Diamond for protecting the ash-pan from the wood-work of the deck of the vessel, if any?" which question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if a defence, the same could not be shown
85 under the pleadings; which objection was sustained and the question excluded; and to which said ruling and decision the said defendant did then and there except.

And said counsel for said defendant did, then and there, offer to ask the said witness the following question: "Did the steamboat Diamond, in the year 1871, carry any and what number of fire-buckets, and any and what number of axes, and where, if it did, on board of said boat were said buckets and axes kept?"

Which question was objected to by the counsel of the said plaintiffs as irrelevant and immaterial, and because, if a defence, could not be shown under the pleadings; and which objection was sustained and said question excluded; and to which said ruling and decision said defendant did then and there except.

And thereupon said defendant did offer to ask the said witness the following question: "Was or was not said steamer Diamond provided with wire tiller-ropes or iron rods, or with wires running to the bells for signaling the engineer from the pilot-house, and with tubes so ar-
86 ranged to return the sound to the pilot-house, or any other arrangement to report back the signal?" which question was objected to by the counsel for the plaintiffs as irrelevant and incompetent, and because, if same, a defence could not be shown under the pleadings; and which objection was sustained and the question excluded; and to which said ruling said defendant did then and there except.

And said defendant, by its said counsel, did, then and there, offer to ask the said witness the following question: "What number of officers and men did the said steamboat Diamond have on board when she was destroyed by fire?" which question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if same, a defence could not be shown under the pleadings; and which objection was sustained and the question excluded; and to which said ruling and decision said defendant, by its said counsel, did then and there except.

And said defendant did, then and there, offer to prove, by said
87 question and by said witness, that said steamboat did not have the number of men and the kind of men required by the act of Congress; and to which evidence said plaintiffs, by their counsel, did, then and there, object as irrelevant and incompetent, and because, if a defence, the same could not be shown under the pleadings; which objection was sustained and said evidence excluded; and to which ruling and decision said defendant did then and there except.

And thereupon said counsel for said defendant did offer to ask said witness the following question: "Did the said steamboat Diamond, during the year 1871, carry as freight any nap'tha, benzine, benzola, coal-oil, crude or refined petroleum?" which question was objected to by the counsel for the plaintiffs as irrelevant and incompetent, and because, if a defence, same cannot be shown under the pleadings; which objection was sustained and the question excluded; and to which ruling and decision said defendant did then and there except.

And thereupon said defendant, by its said counsel, did offer to pro-
pound to the said witness the following question? "Was there
88 special provision made on board of said steamboat Diamond for carrying any of the articles mentioned in the pending interrogatory?" which question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if a defence, could not be shown under the pleadings; and which objection was sustained and the question excluded; and to which said ruling and decision the said defendant did then and there except.

And thereupon said defendant, by its said counsel, did offer to put to the said witness the following question: "Was there any arrangement on board of the said steamer Diamond, during the year 1871, in the way of

life-preservers or floats, for saving the lives of passengers?" which question was objected to by counsel for the plaintiffs as irrelevant and incompetent; objection sustained and question excluded; and to which said ruling and decision said defendant did, then and there, except.

And said defendant, by its said counsel, did, then and there, offer to ask the said witness this question: "Were the buckets, axes, *here*, life-preservers, if any, floats, if any, barrels, tanks, &c., if any, painted or branded with the name of the steamer to which they belonged?" and to which question said plaintiffs did, then and there, object as irrelevant and incompetent, and because, if the same were, could not be shown under the pleadings; which objection was sustained, the question was excluded; and to which said ruling and decision the said defendant did, then and there, except.

89

The witness stated that he was not at Berlin at the time of the fire; that he examined the steamboat after she was towed down to Oshkosh; and thereupon the counsel of the defendant did offer to ask the said witness the following question: "Was the deck of the vessel under the ash-pan burned?" which said question was objected to by the counsel of the plaintiffs as irrelevant and incompetent, and because, if the same was, could not be shown under the pleadings; which objection was sustained and the question excluded; and to which said ruling and decision the said defendant did, then and there, except.

And said defendants did, then and there, state to the court, that he asked said question for three purposes:

1st. To show that the act of Congress was violated in the manner of the construction of that ash-pan.

90

2nd. To show that the plaintiffs did not comply with the terms and conditions of the policy in that particular, and that it was "negligence," within the true intent and meaning of the clause in the policy of insurance on that subject.

3d. That the insurrer had the right to take the insurance upon the property, on the ground that the property was such in all respects as it was required to be by law, and that they did insure the property under such circumstances. Counsel for plaintiffs interposed same objection; which was sustained and evidence excluded; and to which said ruling said defendant, by its counsel, did, then and there, except.

And the said counsel for the defendant did, then and there, offer to ask the said witness the following question: "Have you not stated that, in your opinion, the fire originated under the ash-pan?" and to which question said plaintiffs, by their counsel, did, then and there, object; and the objection was sustained and the question excluded; and to which ruling and decision the said defendant, by its counsel, did, then and there, except.

91

Cross-examination: The navigation between Green Bay and Oshkosh, around the Fox River, is accomplished by means of the canal of the Green Bay and Mississippi Canal Co., around the rapids of Fox River.

Re examined: Those are canals built for the purpose of navigating the river between Oshkosh and Green Bay. Part of the way the canal is in the river and part of the way along the bank. There are eighteen locks between Oshkosh and Green Bay, and they are in the canal by the side of Fox River, and the canal is fed by the waters of Fox River. Plaintiffs here admitted that, between Oshkosh and Green Bay, there are five canals; that some of the canals are in the bed of the river, and in other places outside of the bed of the river.

A. F. MAIZE was recalled by the defendants as a witness, and the plaintiffs thereupon admitted that the steamboat Diamond, on the day before she was burned, made a trip from Berlin to Oshkosh, and back to Berlin, arriving at Berlin at seven o'clock in the evening. And the witness testified that he was on board of the boat at the time of the fire, and at the stern of the boat. When I first discovered the fire, it
92 was pretty nearly all over, so that we had to get off. It was so warm that we had to get off. And thereupon said defendant, by its said counsel, propounded to the said witness this question: "Had you any watchman on the boat that night?" to which question the counsel for the plaintiffs did, then and there, object, as irrelevant and incompetent, and because, if the same was, could not be shown under the pleadings; which objection was sustained and the question excluded; and to which ruling and decision the said defendant did, then and there, except.

There was no steam up that night on the vessel at the time of the fire, and said defendant, by its counsel, did, then and there, offer to ask the said witnesses the following question: "Had you any and what facilities on board of that steamer that night for putting out the fire unless the steam was up?" and to which question said plaintiffs, by their counsel, did then and there object as irrelevant and incompetent, and because, if same was, could not be shown under the pleadings; the objection was sustained and the question excluded; and to which ruling
93 and decision the said defendant did, then and there, duly except.

And thereupon said defendant, by its counsel, did offer to show by said witness that there were no facilities of any kind on board of that steamer for putting out the fire unless steam was up; to which evidence said plaintiffs, by their counsel, did then and there object as irrelevant and incompetent; and said objection was sustained and the question excluded; and to which said ruling and decision the said defendant, by its counsel, did then and there except.

And thereupon the defendant rested its case.

And the plaintiffs called a witness, and proved by said witness that he had computed the interest on the amount of the loss, and that it was $57.82.

And thereupon the plaintiffs rested their case, and the above and foregoing was all of the evidence given on the trial of the said cause; and, under the directions of the judge, the jury returned a verdict for the full amount of said loss, covered by insurance and interest,
94 to wit, to the amount of $3,557\frac{82}{100}$ dollars.

And said defendant did afterwards duly file a motion, founded upon the minutes of the judge, to set aside the said verdict; which said motion was duly argued and submitted, and was denied; and to which decision said defendant, by its said counsel, did then and there, except.

And because said exceptions do not appear of record, I have hereunto set my hand and seal to this bill of exceptions this 23d day of April, A. D. 1872.

D. J. PULLING, [SEAL.]
Judge.

95 The defendant duly appealed from this judgment to this court, & gave undertaking to pay the said judgment if affirmed.

FINCHES, LYNDE & MILLER,
Attorneys for Appellants.

Filed May 22nd, 1872.

H. B. HARSHAW, *Clerk.*

96 Winnebago County circuit court.

JOHN F. MORSE AND C. C. PAIGE
ag't
THE HOME INSURANCE COMPANY OF N. Y.

WINNEBAGO COUNTY, *ss:*

I, H. B. Harshaw, clerk of the circuit court in and for said county, do hereby certify that the papers hereto attached are the original judg't-roll, bill of exceptions, notice of appeal, and undertaking on same, on file and of record in my office, in above-entitled cause, and that same are sent to supreme court pursuant to such appeal.

In testimony whereof I have hereto set my hand and the seal of said court this 24th day of May, A. D. 1872.

[L. S.] H. B. HARSHAW, *Clerk.*

97 And afterwards, to wit, at the June term of said supreme court, begun and held on the first Tuesday of June, to wit, the fourth day of June, A. D. 1872, on the twenty-eighth day of the term, to wit, on the twenty-fourth day of July, A. D. 1872, the following further proceedings were had in said cause in the words and figures following, that is to say:

Winnebago circuit court.

JOHN F. MORSE ET AL., RESPONDENTS,
vs.
THE HOME INSURANCE CO. OF NEW YORK,
appellant.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Messrs. Finches, Lynde and Miller for the said appellant, and submitted for the said respondents on printed briefs, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

98 And afterwards, to wit, on forty-ninth day of the term aforesaid, to wit, on the thirtieth day of October, A. D. 1872, the following judgment was entered in said cause by this court, that is to say:

Opinion, Lyon J.

Winnebago circuit court.

JOHN F. MORSE AND CHARLES C. PAIGE, RESPONDENTS,
vs.
THE HOME INSURANCE COMPANY OF NEW YORK, appellant.

This cause came on to be heard on appeal from the judgment of the circuit court of Winnebago County, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the circuit court of Winnebago County, in this cause be, and the same is hereby, affirmed, with costs against the said appellant taxed at the sum of forty-four and $\frac{6}{100}$ dollars.

99 *Opinion.*

Supreme court.

JOHN F. MORSE AND CHARLES C. PAIGE, respondents,
vs.
THE HOME INSURANCE COMPANY OF NEW York, appellant.

This is an appeal by the insurance company, upon which but two questions are presented, and after very full arguments by counsel, and a careful examination by ourselves, we are quite satisfied that both were correctly decided by the court below.

The first question is as to the validity of so much of the act approved March 14, 1870, and of the agreement of the defendant company filed under it, as declares that "It shall not be lawful for any fire insurance company, association, or partnership incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risk or transact any business of insurance in this State, unless * * * * * such company
100 desiring to transact any such business as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." (Laws 1870, ch. 56, § 22; 1 Tay. Sts., 958, § 22.) The company here having made and filed the agreement and transacted business in this State under it, attempted, when this action was commenced, to repudiate it and to remove the suit to the United States circuit court, in violation of its own deliberate promise, and one of the express conditions upon which it had been permitted to transact such business. The language of its stipulation was: "and said company agrees that suits commenced in the State courts of Wisconsin shall not be removed, by the act of said company, into the United States circuit or Federal courts."

Both the act and agreement are attacked upon constitutional grounds. It is said that both the Constitution of the United States and the laws of Congress provide for such removals, and that any
101 legislation on the part of the States calculated to hinder or prevent them, in cases otherwise proper, is unconstitutional and void. It may be conceded that any State legislation intended or calculated of itself or by its own mere force to defeat or prevent the exercise of the right of removal where it exists, would be unconstitutional and void. It may be conceded that if Congress in the exercise of its plenary power had withdrawn all jurisdiction from the State courts in the class of cases to which this belongs, that is, as "between citizens of different States," that then State legislation of the kind here in question could not be sustained. If, under the Constitution and laws of the United States, exclusive jurisdiction of suits between citizens of different States were given to the courts of the United States, then it might well follow that the State courts could get no jurisdiction by waiver or by express consent, whether such waiver or consent was procured by aid of State

legislation or not. In that case consent would not confer jurisdiction. But the Constitution of the United States does not provide, nor has the Congress as yet enacted, that the Federal courts shall have exclusive jurisdiction in such cases. On the contrary, the Constitution recognizes, and so do the laws of Congress, expressly that the State courts
102 may and shall continue to exercise jurisdiction in all such cases, except where the principle of removal has been conferred upon the non-resident suitor and he has seen fit to avail himself of it by compliance with the regulations of Congress enacted in that particular. But as yet this is a mere privilege bestowed on account of the relationship of being a citizen of another State, and which such citizen may exercise or not at his mere will and pleasure; and the question here would seem to be whether it is a privilege of a kind capable of being waived by the party in whose favor it exists, or such that he may, by stipulation or covenant deliberately and fairly entered into beforehand, bargain away or estop himself from setting up or taking future advantage of it.

And the question thus presented differs very widely from those put by counsel by way of attempted illustration of the supposed unconstitutionality of the act and of the agreement entered into under it. The question differs very widely from that which would be presented, were this the case of a natural person, a citizen of another State, endowed with the full rights of an individual, and subject to no disabilities. It is not a question of the same kind at all, in substance or effect, as
103 it would be if the act and agreement involved the violation of some positive law of Congress, as a law relating to taxation by the United States, or laws regulating trade, commerce, and navigation, or the carrying business between the different States. Instead of being an obnoxious and unconstitutional act and agreement of that kind, it is one which relates to and only proposes to deal with and take away by consent of the party having it, a mere personal or individual privilege conferrred by law of Congress, and which such party is and always has been at full liberty to accept or reject as he may see fit or think for his interest to do. The illustrations of the learned counsel fail, therefore, by reason of the essential differences of the cases. The mistake seems to be in supposing cases, alike which are materially and intrinsically different.

The question comes back, therefore, to one of competency on the part of this company to waive or surrender a right or privilege which it had and which it could accept or reject as it chose, and also to one of power on the part of the State legislation to exact such waiver or surrender as one of the conditions of permitting the company to do business in this State.

104 As to the first point, or that of competency to waive, we suppose it is too late to question at this day that a party may not, under proper circumstances, waive any right, even a constitutional one, in matters of a civil nature, and especially that this may not be done by a corporation, which is the mere creature of the legislative power, and subject to such restrictions and conditions as the legislature deems proper to impose. It was so held by this court in Burrows vs. Bashford, (22 Wis., 103,) and for reasons which there sufficiently appear, and also in Darge vs. The Haricon Iron Manufacturing Company, (ib. 417, 421,) where it was decided that a corporation created under a law of this State could not be heard to object that a provision of its charter was unconstitutional or invalid because it gave a beneficial right of appeal to the opposite party in a suit or proceeding, and at the same time gave the corporation only a nominal and unproductive right of appealing

from the same judgment or decision. It was held that, having organized and acted under the charter so far as to take the property of the plaintiff in that suit, the company was precluded from then ob-
105 jecting to the validity of its provisions, prescribing what the remedy against the company should be. In other words, it was held that the company, having accepted and acted under its charter and received the benefits of it, had accepted also the burdens and disabilities which it imposed and waived, what otherwise might have been a constitutional right or valid objection to the provision. (See also cases there cited, The People vs. Murray, 5 Hill, 458; Van Allen vs. The Assessors, 3 Wallace, 573; and Dunmore's Appeal, 52 Pa. St. R., 374.)

And it would seem, on authority, that there are very few rights and privileges of this nature respecting the remedies of parties to contracts and civil actions, and as to the time, place, and mode of trial, and of entering or of causing judgment to be entered against the party in default, which may not be the subject of express waiver. It was held, for example, by this court, in Ladd vs. Hildebrant, (27 Wis., 135, 146,) that a party to an action might waive a future contingent right, such as before trial in ejectment, the right to a second trial given by the statute, in case judgment in the first should be against him. It
106 was there said that a party may waive a future contingent right, as well as one which he presently has. But a very strong case upon this point is that of Bank of Columbia vs. Okely, (4 Wheat., 235,) where it was held that an act of the assembly of Maryland, incorporating the Bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment against its debtors who had, by an express consent in writing, made the bonds, bills, or notes by them drawn or endorsed negotiable at the bank, was not repugnant to the Constitution of the United States or of Maryland. The objection urged was that the act contravened the article in the constitution of Maryland, which secured the right of trial by jury in all cases at common law; and also the seventh amendment to the Constitution of the United States, which secured the same right in suits at common law, where the value in controversy exceeded twenty dollars. But the same was overruled on the ground of waiver, and because the defendant, by giving his note payable at the bank, had voluntarily submitted to the special jurisdiction created by the act. The court say: "Was this act void, as a law of Maryland? If it was, it must have become so under the restrictions of the constitution of the
107 State or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privations of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note payable at the Bank of Columbia, the debtor chose his own jurisdiction; and in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulation in admiralty, whose voluntary submission to the jurisdiction of that

court subjects him to personal coercion. It is true cases may be
108 supposed in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection." (See also Arnet vs. Insurance Co., 22 Wis., 516.)

We are fully persuaded, therefore, that the right to remove this cause to the Federal court for trial was one which the defendant might waive and relinquish. We can perceive nothing in the policy of the law, either State or Federal, which should forbid or prevent it. As already observed, it was a mere individual or private right, given for the benefit of the defendant, and to be exercised or not at its option; and whether the cause remained in the State court by stipulation, or went to the Federal court without, or because no stipulation had been made, was not a matter which in any manner infringed the policy of the Federal Government, or concerned or involved the dignity or independence of its judiciary. It was a matter which concerned the particular rights and interests of the parties to the action, and no one else.

109 And as to the point of the power of the State legislature to pass such an act, the Supreme Court seem also to have very clearly and definitively settled that. In Bank of Augusta vs. Earle, (13 Peters, R., 519,) it was decided that a corporation created by one State had no power to do any corporate act in another State, unless by the express or implied consent of the latter. And in Paul vs. Commonwealth of Virginia, (8 Wal., 168,) the court use' this language: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This seems decisive of the point, and to preclude the necessity or propriety of further discussion, especially when it is considered
110 that the act does not purport to operate upon or bind the foreign insurance company on the subject of removal, except by its assent freely and voluntary given. As observed in Bank of Columbia vs. Okely, it was with a view to the voluntary acquiescence of the foreign insurance company, nay, its solicited submission to the law of the contract, that this exclusive remedy in the State courts was given. By making and filing the agreement in the office of the secretary of state, the company chose its own jurisdiction, and, in consideration of the rights and privileges extended to it of transacting business within the State, voluntarily relinquished the power and privilege of removal to the Federal courts. As observed by the supreme court of Michigan, in the Glens Falls Ins. Co. vs. the judge of the Jackson circuit, 21 Mich., 580, a case fully in point upon the question here under consideration, the powers thus exercised by foreign insurance companies under our laws are the same as if they were incorporated by our laws, and they become pro tanto Wisconsin, and not foreign corporations, for all practical purposes in this State. If, as decided in Darge vs. The Horicon Iron Manufacturing Company, supra, the legislature may impose as a condition upon acorporation of its own creation that it shall not have the

111 right of appeal from an assessment by commissioners or a judgment against itself, or the right of trial by jury, and such corporation cannot be heard to complain; or if, as decided in Van Slyke vs. The State, (23 Wis., 655,) and in Baynall vs. The State, (25 Wis., 112,) both since affirmed on error in the Supreme Court of the United States, taxes may be annexed to the franchise as a royalty for the grant or consideration for the corporate powers given, where otherwise no taxes could be levied or collected, it would be very strange, we say, if similar conditions or restrictions could not be imposed upon a foreign corporation in consideration of the license or permission granted to it to transact business within the State. Considering that the foreign corporation has no power to do any corporate act in this State, except by the assent, express or implied, of the legislature, and that it derives its whole power and authority to do so from the latter, it necessarily follows that the legislature has the same power and all the power and control over it that it has over a corpora tion of its own creation.

The other question presented on this appeal is, whether the Fox and Wolf Rivers, in this State, above Oshkosh, and between Oshkosh
112 and Winneconne, are public navigable water of the United States, within the admiralty jurisdiction. The policy of insurance upon which this suit was brought was against loss by fire of the steamboat "Diamond," owned by the plaintiffs and used in navigating those rivers between the places named, and among other clauses exempting the company from liability the policy contained the following: "Nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist." The complaint contained the usual averment negativing the loss from such causes, and the answer denied that part of the allegation which was that the loss did not occur "in consequence of any neglect or deviation from the laws or regulations of police existing at the time of such fire." On the trial the defendant interrogated witnesses and offered to prove that the steamboat was not enrolled and licensed for the coasting trade as required by the laws of Congress for vessels engaged in navigating the public navigable waters of the United States, and that she had not on board those appliances, means and facilities for extinguishing fire, prescribed for such vessels by the act of Congress
113 approved February 28, 1871, and by the printed rules and regulations adopted and issued by the board of supervising inspectors of steam-vessels under said act. The evidence was excluded, and the question thereupon arising is whether the vessel was within the operation of those laws which depends upon the navigable character of the streams upon which she was employed at and before the time of loss. The acts of Congress apply only to vessels navigating the public navigable waters of the United States to which admiralty jurisdiction extends, and this question, much more than that first above considered, is one of peculiarly Federal jurisdiction and cognizance. We have been favored with a newspaper copy of an able and elaborate opinion of the circuit court of the United States for the eastern district of this State, delivered by Miller, D. J., in the case of the United States vs. The Steamer Montello, which fully examines and discusses the navigable character of these rivers, at and between the places above referred to, and from a point far below Oshkosh, on the Fox River. It was there held that the Fox River, and of course its tributaries above Depere Rapids, is not a public navigable water of the United States,
114 within the admiralty jurisdiction. We are not aware that the precise question has been determined by the Supreme Court,

though the case in the circuit court was the same as that in the Supreme. The Montello, (11 Wal., 411,) where the court declined to consider it for want of sufficient allegations and evidence showing the precise character of the Fox River as a navigable stream, and remanded the cause to the court below for further proceedings, in order that those defects might be obviated. The cases of Neogie vs. Wyman, (14 How., 568,) and The Daniel Ball, (10 Wal., 557,) seem to be decisive of the principle of law involved, as well as the former, to touch very closely upon the facts here presented. But it does not become this court to scrutinize or disregard the decision of the learned circuit court upon a question of this nature. We cannot, if we would, force upon that court a jurisdiction which it declines to take under the laws of Congress, nor give to those laws an interpretation different from that which they receive in the judicial tribunals whose duty and sole prerogative it is to expound and apply them. When the decision of the circuit court is reversed, if by chance it shall be on a second appeal, which we understand is pending, then, of course, this court in common with that will stand cor-
115 rected upon the question, but, until that time, if it shall ever come, we are quite content to abide the decision of the circuit court.

In conclusion, we have to express the satisfaction that if we are wrong upon either or both the questions which have been considered, the defendant in the action has its remedy to correct us by writ of error issuing from the supreme court.

Judgment affirmed.

116 STATE OF WISCONSIN,
Supreme Court, ss:

JOHN F. MORSE AND CHARLES C. PAGE, respondents,
vs.
THE HOME INSURANCE COMPANY OF NEW York, appellant.

I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the return hereunto annexed is a full return of all the record in the above-entitled cause, containing all the papers, exhibits, depositions, and other proceedings appertaining thereto, and also the opinion of our said supreme court; that I have compared the same with the said original proceedings, & that they are a true transcript therefrom & of the whole thereof; that the original writ of error, citation with service endorsed thereon, and a copy of the bond, are appended to said return, and that they are all returned to the honorable Supreme Court of the United States, in obedience to the mandate contained in the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this 23d day of November, A. D. 1872.

[SEAL.] LA FAYETTE KELLOGG,
Clerk Supreme Court, Wis.

(Indorsed:) State of Wisconsin, supreme court. The Home Insurance Company of New York, plaintiff in error, vs. John F. Morse and Charles C. Paige, defendants in error. Return to writ of error.

(Indorsement on cover:) No. 296. The Home Insurance Company of New York, plaintiff in error, vs. John F. Morse and Charles C. Paige. Wisconsin sup. c't. Filed 30th November, 1872.

Supreme Court, United States.

No. 296.

THE HOME INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

against

JOHN F. MORSE and CHARLES C. PAIGE,

Defendants in Error.

BRIEF ON RE-ARGUMENT.

H. M. FINCH,
Of Counsel for Plaintiff in Error.

Milwaukee News Company Printers.

Supreme Court, United States.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
against
JOHN F. MORSE AND CHARLES C. PAIGE,
Defendants in Error.

A re-argument having been ordered in this cause, I have concluded to furnish an entirely new argument upon the question whether Fox River is a navigable water of the United States.

By examining a map of Wisconsin, which I shall exhibit, Your Honors will see that Oshkosh is located on Fox River and Lake Winnebago. *Berlin*, by this map, is located on Fox River, in the county of Marquette. Since the map was published Marquette county has been divided and Berlin is in that portion which is now known and called Green Lake County. Fox River has its source in Columbia county, in or near what is designated on the map as "Mud Lake." Its course is through Marquette and Winnebago Counties to Oshkosh, and thence into and through Lake Winnebago into Green Bay and Lake Michigan. From its source to Oshkosh the River is frequently spoken of as the "Upper Fox." From Lake Winnebago to Green Bay it is called the "Lower Fox." The character of the stream from Oshkosh to "the portage," (at the source of the Fox River,) is described in the report of

D. C. HOUSTON, engineer, (in his annual report upon the improvement of the harbor, at page 51,) as follows:—"From Oshkosh there is deep water to the head of Lake Buttes des Morts, where there is a narrow bar with four feet at low water. The water from here is six feet and upwards most of the way to Omro. Above here to Portage City the soundings, which were taken *in very low water*, show variable depths from *two to fifteen feet.*" At the "Portage," so-called, a canal has been constructed connecting the waters of the Wisconsin River with those of the Fox River. The same map will show Your Honors the course of the Wisconsin River from the "Portage" to the Mississippi River. The Wisconsin enters into the Mississippi at Prairie du Chien. By the canal, steamboats have passed from the Mississippi River through the Wisconsin River into the Fox River and thence through Lake Winnebago into the Lower Fox to Green Bay. A very full history of the character of these "improvements" of the Fox River is given in this report. (See pages 46 to 56, report of 1873.)

The history of the Fox River improvement, and the connecting of the waters of the Wisconsin River with the Fox River, by the canal, is found in public documents and laws to some of which I will call the attention of Your Honors.

In the message of HENRY DODGE, Governor of the Territory of Wisconsin, of the date of Nov. 27th, 1838, is found this language: "I respectfully recommend to the Legislative Assembly the propriety of memorializing Congress, asking a donation of one hundred and fifty thousand acres of land to be sold, and the proceeds to be applied under the direction of the Legislative Assembly in such a manner as they may direct for the *improvement* of the Fox River of Green Bay, the Rock and Pecatoneca Rivers, and connecting the waters of Rock River through the Four Lakes with those of the Wisconsin River. The *improvements* of the navigation of the Fox River and the Wisconsin River at the Portage, the distance of one and one-fourth miles *would be the means of opening a direct northern communication between Lake Michigan and the Mississippi. The*

important results that would flow from the accomplishment of that work to the people residing on the borders of the Fox and Wisconsin Rivers must be apparent. The rich and fertile country bordering on these rivers would be open to the enterprising emigrant. The people of the Upper Mississippi and the extensive settlements which are now forming on Lake Michigan, and the settlers who occupy the intermediate country would be alike benefitted. A direct communication would be open to the eastern markets, for our lead and shot manufactured near the Wisconsin River. The United States engineer charged with the survey of the Fox River has made a favorable report to government as to the *importance* and *practicability* of the navigation of that river. *Steamboats have navigated the Wisconsin River during the past and present seasons without obstruction as far as the portage of the Wisconsin and Fox Rivers.* The canal, commenced two years since, to connect the waters of the Fox and Wisconsin rivers was suspended during the last season. The company chartered for that purpose here, again resumed their operation this season, and the early completion of that *important work* may be expected." (Journal of the Council of the Wisconsin Legislature, pages 10 and 11, 1839.)

At the same session of the Legislature a memorial was addressed to Congress in which is found this language: "The Legislature would also urge upon Congress with earnestness the fact that a deep interest is felt by the citizens of the Territory in *the improvement of the Fox River;* some slight improvement in which, *together with the construction of a canal from the Fox to the Wisconsin River* of one and a quarter miles long, (which has already been commenced,) *would afford an uninterrupted water communication from the Great Lakes to the Mississippi by a route* WHICH NATURE SEEMS TO HAVE DESIGNATED FOR THAT PURPOSE." (Same book, page 118.)

In 1840, the Governor, in his annual message, said: "No good reason can be assigned why Congress should not be equally liberal in granting donations in land for *the improvement* of the navigation of the Wisconsin and Fox Rivers, *and uniting*

the waters of those rivers by a short canal at the Portage." (Journal 1840–1, page 16.)

J. H. TWEEDY, chairman of "the Committee on Internal Improvements," made a report at the same session of the Legislature, in which he says: "A memorial to Congress for an appropriation for *the improvement* of the Fox and Wisconsin Rivers has been approved by the Governor."

In 1843, J. D. DOTY, Governor of the Territory, in his message to the Legislature, says: "The extensive and valuable trade *which is prosecuted upon the Wisconsin River*, and the rapidly increasing settlements upon its borders and tributaries demand that such means should be employed as are within the control of the Legislature to improve the navigation of this stream. An appeal to Congress by a memorial, if sustained by the delegate, would undoubtedly influence that body to grant an appropriation for the object which has ever been regarded by those acquainted with the facilities which this River and the Neenah *afford for a steamboat navigation between the Mississippi and Lake Michigan of great national importance.*" ("Journal of the Council for 1842–4. page 62.)

In the same book, page 25 of appendix, the committee "on improvement of boundaries," say: "The propriety of making an appropriation for the improvement of the Fox and Wisconsin, as a matter of national concernment has been respectfully pressed upon the attention of Congress by the Legislative Assembly as well as by the officers of the United States, and it is hoped that the day is not distant when, independent of all other considerations, it will receive that attention at the hands of Congress which it so well merits." And on page 28 of the appendix, the same report says: "Wisconsin desires, and her wants imperiously require the construction of a railroad across her territory connecting Lake Michigan with the Mississippi River; the improvement of the navigation of the Fox, (sometimes called the Neenah,) and Wisconsin Rivers."

The Legislature of 1841 memorialized Congress on the subject. The memorial is printed on page 4 of the appendix.

(Journal of the House, 1840.) The memorial is quite lengthy. It sets out the reasons at length, and concludes by alleging, among other reasons for action of Congress, that "the ordinance of 1787 takes from the Legislature of the territories the power of granting the right to individuals to improve these rivers and to receive tolls for the passage of boats thereon," &c.

In 1846 Congress enacted a law giving a large grant of lands for the purpose of improving the navigation of the Fox and Wisconsin Rivers; 9th Statute at large, page 83.

The State of Wisconsin accepted the grant. (R. Statutes 1849, page 765.) This act was approved June 29th, 1848.

By an act approved August 8th, 1848, the Legislature of Wisconsin prescribed the manner in which said work should be carried on, and the lands sold. (R. Statute, 1849, page 765.)

From that date on there has been much legislation on this subject. I cite the following references to laws:

Chapter 74 laws 1849, page 45.
" 118 " " " 76.
" 275 " 1850, " 222.
" 283 " " " 226.
" 38 " 1851, " 29.
" 165 " " " 162.
" 179 " " " 191.
" 340 " 1852, " 513.

This last law was repealed in 1853. (Laws, 1853, page 75.)

Chapter 217, laws, 1852, page 342.
" 375, " " " 575.
" 408, " " " 612.
" 464, " " " 690.

The last law was subsequently repealed by Chapter 73, laws of 1853.

By Chapter 98, laws of 1853, page 92, an association was formed under the name of the "*Fox and Wisconsin Improvement Company.*" The Act is entitled, "An Act to incorporate an association for the completion of the improvement of the Fox

and Wisconsin Rivers." By Chapter 112, laws 1856, page 123, this company was required to go on and complete the work. The time for completing this work was extended by Chapter 360, Private and Local Laws, 1867, page 908. The case of *Denniston vs. The Unknown Owners*, 29 Wis. 357, contains a concise history of some of the important legislation of the State in relation to this improvement.

The reports of the Chief of Engineers for 1872, from pages 132 to 148, and of 1873, pages 31 to 60, already partially referred to, will give much valuable and correct information touching these waters and their improvement.

Since this cause was tried, Congress has authorized the general government to take the entire work. (16 Statutes at Large, 189.) And the State has authorized the present corporation to make the sale. (Private and Local Laws 1871, page 973.)

In Appleton's Encyclopedia, under the title of "Wisconsin," will be found a short statement of the Fox and Wisconsin Rivers.

As early as May, 1838, Doty and others had advertised in a newspaper printed at Green Bay that they would transport merchandise from Green Bay to a place called the Wisconsin Portage, at or near Fort Winnebago, in the County of Portage in the Territory of Wisconsin, in Durham boats of thirty tons burden. (See *Doty vs. Strong*, 1st Pinney's Wis. Rep., pages 316–321.)

That Fox River was the usual channel, and Durham boats, the customary and usual means of transporting merchandise from Green Bay to the Portage is not only settled by the facts stated in the case of *Doty vs. Strong*, above cited, but is shown by evidence given in the case of the *Montello*. (printed case, page 16, see also pages 24–25, see also page 29.) The facts are well condensed in the opinion of Judge Miller, printed on page 43 of the *Montello* case. SMITH, in his history of Wisconsin, vol. 1, page 81, says: that "at this time, (1718,) the *three great avenues* from the St. Lawrence to the Mississippi

river, were one *by the way of Fox and Wisconsin Rivers*, one by way of Chicago, which had been safely pursued since the days of Marquette, and one by the Miami of the lakes," &c.

The steamboat Diamond, at the time the policy of insurance sued upon was issued, and at the time of its destruction by fire, was regularly engaged in the transportation of merchandise and passengers, which came from places outside of Wisconsin, from Oshkosh to Berlin, on Fox River. It is admitted that she carried "both passengers and merchandise, which came from outside of Wisconsin, on the Fox and Wolf Rivers, between Oshkosh and Berlin."— (folio 73, page 35 printed case.) It was further admitted, "that the waters of the Fox River empty into Green Bay, and that Green Bay is water connecting with Lake Michigan and Lake Huron into Lake Erie, and Lake Erie into Lake Ontario, and Lake Ontario into the River St. Lawrence, and the River St. Lawrence into the Atlantic Ocean, and that steamboats have navigated the Fox River from Oshkosh to Green Bay, and to points outside of the State of Wisconsin, carrying goods and merchandise to points and places other than in the State of Wisconsin for the past fifteen years." Here then is a water course, which in its present ordinary condition, is used as "a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Fox river from Oshkosh to Green Bay has been so navigated by steamboats for fifteen years or more, according to the fact as stipulated in this cause.

That the Fox and Wisconsin rivers in the early settlement of Wisconsin, were the great channels of commerce, between the Upper Mississippi and the Eastern States is clearly shown by the public records, to which we have referred. The French had established their trading settlements along these rivers. It was through this channel the immense fur trade of the Northwest was carried on for more than a century. It was by this route that Marquette and his companions, in 1673, discovered the Upper Mississippi. (1st vol., "Conquest of Canada," by author of Hochelaga, pages 294–5.) By the ordinance of 1787 it is provi-

ded that "the *navigable waters* leading into the Mississippi and the St. Lawrence, and the *carrying places* between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States and those of any other States that may be admitted into the Confederacy, without any tax, import or duty therefor."

The origin and history of this ordinance is well sketched in the masterly argument of Hon. EDWIN M. STANTON, as reported in 13th Howard, page 522. He shows in that argument that the question of keeping open and free the waters leading into the Mississippi and St. Lawrence, was first presented to the Confederate Congress on the 12th day of May, 1786. He recites at length the resolution introduced into that Congress, and shows that the ordinance of 1787 contains a regulation in the same words of the resolution introduced into the Confederate Congress by Mr. Grayson. He affirms that "a similar provision in the nature of a condition, has been imposed on the admission into the Union of every State in the Union bordering upon these waters." He is confirmed, (at least so far as the State of Wisconsin is concerned,) by the legislation of Congress. By section 3, of the Act to enable the people of the State of Wisconsin, to form a Constitution and State Government, and for the admission of such State into the Union, (R. S. Wis. 1858, page 1082,) the condition is imposed that the rivers and waters forming its boundary, and the navigable waters leading into the same shall be forever free. The State of Wisconsin accepted the condition, and by Article 9 of its Constitution, declared the acceptance in the exact language of the ordinance. (R. S. 1858, page 40. Article IX. Section 1.)

The validity of this ordinance, and the absolute control of Congress over the waters contemplated by it, has been frequently asserted and maintained.

Cox vs. The State, 3d Blackford, 193.

Hogg vs. Zanesville Canal Co., 5th Ohio, 410.

Ills. River Packet Co. vs. Peoria Bridge Co., 38th Ills., 467.

Jolly vs. Terra Haute Bridge Co., 6th McLean, 237.
State of Pennsylvania vs. The Wheeling Bridge Co., 13th Howard, 519.
Hickox et al vs. Hine, 23d Ohio State Rep. 524.

That the navigation of the Fox and Wisconsin Rivers, is and has been the subject matter of great thought and attention on the part of leading statesmen, is clearly shown by the public documents, I have referred to; that Congress deemed the subject worthy of attention, is shown by the large and valuable land grant, made for their improvement, and by acts of the Departments of the Government.

In 1839, the War Department ordered a preliminary survey of these rivers, and an estimate of the costs of their improvement was then made. In 1846 a large grant of lands was made to the State of Wisconsin on the admission of such State into the Union for the sole and express purpose of improving the navigation of the Fox and Wisconsin Rivers. Acts of Congress were passed in 1854 and 1855, by which the grant of lands was defined and enlarged. (11th Stat. at Large, page 724.) The Governors of Missouri, New York, Wisconsin, Iowa and Minnesota, in their messages to the Legislature of 1870 called attention to this improvement. All these public acts are evidence of the great importance of the work and the necessity felt of a complete navigation by the Wisconsin and Fox Rivers, from the Mississippi River to Lake Michigan, as a great National highway for commerce.

I suppose it would not be doubted that a steamer laden with goods and persons from Dubuque, Iowa, and destined to Green Bay, could be libelled in the Admiralty Court for colliding with a steamer, journeying from Green Bay to Dubuque, in the canal connecting the waters of the Wisconsin and Fox Rivers, or in the locks between Lake Winnebago and Green Bay. In other words I suppose the fact that a portion of the navigation was in or through *artificial channels*, would not of itself defeat the admiralty jurisdiction. The fact that the navigation of the two rivers had been greatly improved at the expense of the Federal

Government, by means of artificial canals, locks, dams, and dredging, would not be deemed sufficient to deprive the proper Admiralty Court of its jurisdiction. Much of the commerce of the world is now carried on in or through artificial or improved channels of navigation. There is hardly a river flowing into the lakes that has not been deepened or widened, or its navigation otherwise improved. The fact that navigation has been aided, improved, or greatly enlarged by *artificial means*, certainly cannot be a conclusive test, or any test against the water course thus improved, being a navigable water of the United States; that was not the test which this Court applied in the cases of the Daniel Ball and the Montello. The true test is whether such improved waters, by themselves, or in connection with other waters, form a continuous highway over which commerce from foreign countries and other States may be transported in the ordinary manner in which it is done by water. Justice FIELD, in the case of the *Montello*, 11 Wallace, 415, says of the Fox River: "*If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places in the State, then it is not a navigable water of the United States, but only a navigable water of the State*, and the acts of Congress to which reference is made in the libel for the enrolment and license for vessels have no application."

I admit that without the improvements by locks, canals, and dams, Fox River could not be navigated by a steamboat or sail vessel from Berlin via Oshkosh to Green Bay. But with these improvements the produce of the country can be transported from Berlin to Green Bay by steamboats, and from thence to tide water, and merchandise and people coming from foreign nations, and other States by the waters of Lake Michigan to Green Bay, can be transported by water over the same route to Berlin or other points in the State of Wisconsin.

The question then seems to be this: Is Fox River, the navigation of which has been improved, by the aid of the United

States government, by the building of locks, dams, and canals, so that it is now navigable for steamboats from Berlin to Green Bay, or Lake Michigan, *a navigable water of the United States?* It must be so under the rule laid down in the cases of the *Daniel Ball* and the *Montello*, unless the fact that the navigation has been improved by artificial means, is the ultimate and final test against its being navigable water of the United States.

The case of the *Avon*, 6th Vol., Chicago Legal News, page 41, decided by Judge EMMONS would seem decisive on the question that the mere fact that an *artificial channel* for navigation has been constructed, is not of itself a true or conclusive test against the admiralty jurisdiction. In that case a collision occurred in the *Welland Canal*—the canal that unites Lake Erie with Lake Ontario—*wholly an artificial channel.* A libel was filed against the colliding vessel. The point was taken that the collision occured in the Welland Canal. Judge Emmons says: "That the waters of the Welland Canal, *as now used* for international commerce are within the admiralty jurisdiction, we had, as we remarked on the argument, no doubt."

* * * There are few harbors in the Northwest which are *not entered through wholly artificial passages.* It would be most impolitic to say a ship in passing through our St. Mary's Canal between Lake Huron and Superior, is beyond the process of admiralty. A large portion of the commerce of the latter lake will soon pass through the Portage Lake Canal. The St. Clair Flats are now so crossed by a similar channel, through which passes as much international commerce as through any waters on the continent. The Suez Canal, those of Venice, Amsterdam, Rotterdam, and the Great Northern Canal, and basins of Holland, *and all the improved navigation of the world have been, and from the nature of their use* should be as much *subject to the admiralty jurisdiction as waters in natural channels.* It would be a most mischievous and gratuitous distinction which would exclude them." He cites cases in his opinion where collisions had occurred in the "Golden

Horn," at Constantinople, and "in the roadstead off the town of Dardanelles, and within the municipal jurisdiction of Turkey," and in which libels had been filed and sustained against the colliding vessels. The learned Judge might have cited, as pertinent to the subject, the Caledonian Canal in Scotland, and more particularly the Canal at Louisville, around the falls of the Ohio, as illustrating the necessity of *improving* as well as *enlarging* navigation by artificial means. The annual appropriations by Congress for the construction of harbors, dredging channels, constructing locks, and all other work necessary to improve the navigation of public waters, are but confirmations of the necessity as well as expediency of holding such *improved* navigation subject to and under the control of the General Government, and such laws as it may enact for safety and protection to persons and property. If *improved* navigation may be and remain subject to and under the control of the General Government, then Fox River, in its *improved condition*, is a public navigable water of the United States, and for the reason that in its improved condition it does enable commerce from foreign countries, and the States outside of Wisconsin, to be carried on by water, in the customary mode of transportation by water, to points and places in the State of Wisconsin. By means of these improvements, the steamboat Diamond was enabled to, and at the time the Insurance Policy in suit was issued, could have transported merchandise and passengers destined to places outside of the State of Wisconsin, from Berlin via Oshkosh to Green Bay, by water, and in like manner could have transported passengers and merchandise, coming from without the limits of Wisconsin from Green Bay via Oshkosh to Berlin. It could do more than that at certain stages of water in the Wisconsin river. It could in high water stages of that river, by the aid of the Canal connecting that river with the Fox River, keep on its journey from Berlin to St. Louis, or New Orleans, or ascend the Upper Mississippi to St. Paul. And when all the contemplated improvements are done, it is supposed and believed that during the entire season of naviga-

tion, steamers can go from Green Bay to the Mississippi River, and from that river to Green Bay, carrying goods and passengers. It is unnecessary as it seems to me to enlarge upon the question that such a water communication is and must be a navigable water of the United States, and that steamers employed on these waters in the transportation of merchandise and passsengers, from without the limits of the State of Wisconsin, to points and places within the State, are subject to be enrolled, inspected, licensed and equipped as required by the laws of Congress.

This question would seem a plain one, but for the fact that the District Court of the United States, for the Eastern District of Wisconsin, has held otherwise in the case of the steamer *Montello*. The opinion in that case was delivered by the Hon. A. G. MILLER. I have carefully examined the opinion. The learned Judge seems to proceed upon the idea that only such waters as are navigable in their natural state, by steamboats and vessels, are to be deemed navigable waters of the United States. Entertaining these views, he holds that Fox River *from Green Bay to Depere*, is a navigable water of the United States, but above Depere *it is not*. He says:—"*There not being obstructions in Fox River, below Depere Rapids, to steamboats and vessels used in navigating Lake Michigan and Green Bay, the bay and the river to that point, may be considered as a continued arm of the lake.*" The "obstructions" to this navigation have been removed by the improvements made, so that steamers can and do pass directly from Berlin, and even from the Mississippi River, to Green Bay. The "Montello" can now, by the improvements made, make this passage. The idea of the learned Judge being that only such waters as are navigable in a state of nature for steamboats and vessels, are "navigable waters of the United States," it was easy for him to reach the conclusion that Fox River, above Depere Falls was not within the rule he lays down as the test of "navigable waters." And he therefore rightfully concludes, from his premises, that the steamer Montello was not required to be enrolled, licensed,

inspected or equipped, as provided by the laws of Congress, because in the natural state of the river she could not reach the waters of Lake Michigan. It is this idea which I combat. It seems to me that the fact that navigation is, at some points in a river, so far "obstructed" by a natural barrier that steamboats and vessels cannot pass the obstruction, is not the vital or essential point. There are but few rivers, which in their natural state do not present serious "obstructions" to navigation. The skill and genius of man has and does overcome these natural obstructions, and by artificial means remove or improve them, and thus great avenues for trade and commerce are opened.

But it seems to me that the facts found by the learned Judge, and set forth in his opinion in the *Montello* case, do clearly show that "commerce" was carried on on Fox river, *in its natural state*, from Green Bay to Fort Winnebago, in Durham boats. He says in his opinion:—"Goods and provisions were carried up the river *in its natural state*, from Green Bay to Fort Winnebago in Durham boats. *The cargoes were the products of other states and countries*, and sometimes furs were brought down the river from Fort Winnebago. * * * They had difficulty in pushing through the mud and over sand bars which obstructed the navigation; there was very little trade on the river before the year 1845. The greater part of the trade was in carrying up supplies to Fort Winnebago, and to Indian payments. *Before the canals there was no way of navigation but in the river.* Durham boats drew from two to two and one-half feet of water when loaded, and are from seventy to one hundred feet in length, with twelve feet beam." By this statement it would seem that Fox River, in in its *natural state*, was "a highway for commerce," for the transportation of the "products of other states and countries." The learned Judge, appreciating this great fact, and its importance on the question, is compelled to assert "that products of foreign countries or of States of the Union, having been carried on the river in Durham boats *destined for foreign countries, or for other States*, under THE DIFFICULTIES

of the navigation, proven by the witnesses, cannot be characterized as commerce!" Why not? The "difficulties" of navigation do not appear to me to have anything to do with the solution of the question. There are times when navigation on the Upper Mississippi River is impeded, greatly delayed, by sand bars or low water but this fact I apprehend would not be conclusive against the admiralty jurisdiction. The fact as shown by the public documents is that in the early settlement of Wisconsin, this very Fox River was the only water channel of communication in Wisconsin, between Lake Michigan and the Mississippi River. There were "difficulties" in the way of rapid navigation, even with Durham boats, with the river in its natural state. The ordinance of 1787 recognized the fact that there were "portages," or "carrying places," that is, places where boats must be partially unloaded, and a portion of their cargoes carried around rapids or falls. Hence not only the "navigable waters," but the "*carrying places* between the same," were declared forever free. But when the fact is conceded by the learned Judge that "products of foreign countries or of the States of the Union" were carried up and down the river, in its natural state, in Durham boats, then as it seems to me he conceded acts sufficient to establish the navigability of the Fox River for commerce, even in its natural condition.

The learned Judge says, in his opinion, "the river above Depere did not form a continued highway over which commerce was carried on with other states and countries in the customary modes in which commerce was conducted by water." It is difficult for me to understand why not. The "customary mode," in the days prior to the improvement, was by Durham boats on the Fox River. The Fox River was the channel. With all the alleged "difficulties" navigation was carried on. As we have seen, as early as May, 1838, a regular line of Durham boats was advertised to run from Green Bay to the Wisconsin Portage. The fact that in some places there were rapids, and in some places low water, did not at all alter the fact or prevent the navigation. At such points the Durham boat was partially un-

loaded, and when around the obstruction the goods were reloaded and the boat and cargo proceeded on its way to its destination. At some of the "portages" or "carrying places" the American Fur Company kept cattle to assist in hauling the cargo around the "rapids," or the "obstructions." But with these difficulties navigation was carried on. "Products of foreign countries and of other States of the Union" were successfully and constantly carried up this river from Green Bay to Fort Winnebago, and furs and lead were carried by the return boats from Fort Winnebago to Green Bay; and by transporting boat and cargo from Fort Winnebago to the Wisconsin, a distance of one and one-quarter miles, it and its cargo could reach the Mississippi River. All this was going on for years. The learned Judge says that this was not "commerce" but "trade." There is a distinction, he says, between "commerce" and "trade." If I accept the definition given by him that "commerce," in the sense of the constitution, "is the intercourse of nations and states in each other's produce and manufactures in which the superfluities of one are given for another, and those re-exchanged with other states or nations for mutual wants," then I am forced to the conclusion "that products from foreign countries or of other States of the Union" brought into Wisconsin by the way of Lake Michigan to Green Bay, and thence transported in Durham boats from Green Bay to Fort Winnebago, and there used "for supplies and Indian payments," and re-exchanged for furs and lead, (then the only products of sale or barter in Wisconsin,) are *commerce*, without doubt. The same articles, for the same purpose, and disposed of in the same manner, if they had been transported in a steamboat instead of a Durham boat, or if carried in a flat boat from St. Louis to New Orleans would have been "commerce" within "the sense of the constitution." I conclude therefore that "commerce" was carried on on Fox River *in its natural state*, and that too in the "customary mode" in which "commerce" was carried on on that river at that time.

The Fox River was, at that time, so far a navigable water of the United States that no dam or "obstruction" could have been built by an individual that should have impaired or destroyed its navigation. The ordinance of 1787 protected the waters of Fox River against any such obstructions. Any one desiring to navigate that river with a Durham boat was free to do it. No citizen could, in any manner, obstruct or prevent its navigation.

I assert then, that it is not the "vehicle" by which goods are transported, nor the "difficulties" attending navigation that are the real test to be applied in the solution of this question. The test is whether, in *its now present and improved condition*, commerce can be successfully carried on in the usual and customary methods by water on the waters of the Fox and Wisconsin Rivers

The learned District Judge answers this question. He affirms—I quote his language—that "since the improvement of the river several steamboats have been run on the river, measuring from sixty to one hundred and fifty tons." The fact is stipulated in this case "that *steamboats have navigated the Fox River from Oshkosh to Green Bay, and to points outside of the State of Wisconsin, carrying passengers and merchandise to points and places other than to the State of Wisconsin for the past fifteen years.*" And it was further admitted that "the steamboat Diamond carried both passengers and merchandise which came from outside of Wisconsin on the Fox and Wolf Rivers, between Oshkosh and Berlin."

The solution of this subject is that Fox River in its natural state was used as a great public highway for commerce. As Wisconsin grew in wealth and population, and had other articles to exchange for foreign products, beside lead and furs, it was found that navigation by Durham boats would not answer the demands of commerce. It was necessary to employ steam power. But to so use this river, its navigation must be improved—natural barriers overcome by artificial means—the river must be deepened in some places, the channel narrowed

in others, and in other places widened. The State through her Executive and Legislative Departments, appealed to Congress for aid. Canals, locks and dams were built, the channel deepened and widened, until in process of time, the Fox River from its source to its mouth was made navigable for steamboats. By the canal connecting the Wisconsin River with the Fox River, navigation from the Mississippi River to Lake Michigan was made possible by steamboats. DANIEL M. WHITNEY, a witness sworn in the Montello case, says: (at folio 56, page 29, of the printed case,) "he has known of boats passing from Lake Winnebago, and so into the Mississippi, several of them, in 1850." And that "since 1856 there has been an extensive trade and commerce, carried on from Green Bay up the Lower Fox River into Lake Winnebago, and the Upper Fox and Wolf Rivers. There was a large amount of things taken up by that route, and a large amount of *wheat and flour taken down.*"

At the time the libel was filed against the steamer Montello, the Fox and Wisconsin Rivers were united by the Canal, and these rivers, by the aid of the Government, had been so far improved that "commerce" was actually carried on by steamboats, from various points in Wisconsin, to the Mississippi River, and to Lake Michigan.

These facts, as it seems to me, show clearly that Fox River between Oshkosh and Portage City is now a public navigable water of the United States. The ordinance of 1787 is as applicable to both the Wisconsin and Fox Rivers to-day, as when that famous ordinance was passed. The State of Wisconsin has to-day no power to authorize any citizen or corporation to impair or destroy its navigation. It is now as it was in 1787 a channel for "commerce," with foreign nations, and the several States. It must under that ordinance, and the compact between the United States and Wisconsin, remain free from obstructions by the act or authority of the State or its citizens, so long as that compact is in force.

If the mere fact that the "improvement" of a river at the expense of the Government, or by the approval and with the

aid of the Government, is not sufficient of itself, to defeat the admiralty jurisdiction, and that the true test is whether the river in its improved condition, is used or can be used for "commerce" with foreign nations, and between the States in the usual and customary method of transportation by water; then it is apparent that the decision of the learned District Judge in the *Montello* case was and is erroneous.

The Supreme Court of the State of Wisconsin, without examining the facts of the case, adopt the legal conclusions of the District Judge, and hold that Fox River, in its improved condition, is not a navigable water of the United States from Berlin to Oshkosh, and that the steamboat Diamond was not obliged to be enrolled, licensed, inspected or equipped as provided by the laws of Congress. Under such a ruling none of the safe guardswhich Congres has deemed necessary, in order to protect lives and property on the rivers and lakes, can be compelled on the steamers plying on Fox River, although passengers may step direct from the steamboat or propeller that has brought them from Buffalo to Green Bay, and be carried by steamer direct to Oshkosh, Berlin or Portage, and from the latter place via the Wisconsin River to St. Paul, or New Orleans. A decision leading to such a result, I have endeavored to show is erroneous. It seems too plain for argument, that the mere fact that a portion of Fox River is made navigable for steamers, by means of canals, or locks—artificial channels—does not prevent the application of the laws of Congress. If such is the law, then it must be held that vessels which ascend and descend the St. Lawrence River by the aid of the Canal along its border, or boats that pass Lake Huron into Lake Superior, through the St. Mary's Canal, or steamers that ascend and descend the Ohio River by passing through the Canal, at or near Louisville, around the rapids in the Ohio river, and the steamers and vessels daily and hourly passing from Lake Erie to Lake Ontario, through the Welland Canal, or *vice versa*—are each and all beyond the jurisdiction of the admiralty, and beyond obedience or supremacy to the laws of

Congress. As Judge EMMONS says: "It would be a most mischievous and gratuitous distinction which would exclude" such navigation from the admiralty jurisdiction, or place such steamers and vessels beyond the reach of the laws of Congress.

If the case of the schooner *Avon* was correctly decided, the *Montello* case was erroneously decided. The *Avon* was in *a wholly artificial channel at the time of the collision*, but it was a channel through which and in which floated the "commerce" of foreign nations and the several States—inter-state commerce. So are the waters of Fox River, *partly* not wholly, by *artificial means*, made "a highway for commerce." The Diamond" was an agent in the transportation of commercial products from foreign States, as much as was the schooner *Avon*. If the *Avon* could be successfully libelled for occasioning a collision in the *Welland Canal*, then by parity of reasoning a steamer laden with goods or merchandise, "from without the State of Wisconsin," destined to points and places within the State, proceeding from Green Bay to Berlin, and colliding with another steamer in one of the canals or locks, between Green Bay and Lake Winnebago could be prosecuted in the admiralty. Such a steamer under such circumstances is as much engaged in inter-state commerce, as a steamer going from Cincinnati beyond Louisville, and obliged to pass through the canal at Louisville, or a vessel passing on her journey through the Welland Canal.

If this be a sound conclusion then the steamboat "Diamond," although *plying between points exclusively within the State of Wisconsin, was subject to the requirements of the acts of Congress, as to being enrolled, licensed and equipped*, for it is admitted that the "Diamond" was engaged in the transportation of passengers and freight on the Fox River, (between Oshkosh and Berlin,) *which came from outside of the State of Wisconsin.* She was doing just what it was proved the "Daniel Ball" was doing in the State of Michigan. The point was made in that case that the Daniel Ball was employed *exclusively* within the State of Michigan, and the point was distinctly met and an-

swered by this Court. Justice FIELD says, on page 565: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in connection of any line of vessels or railways leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow, so far as she was employed in transporting goods from other States, or goods brought from without the limits of Michigan and destined to places within that State; she was engaged in commerce between the States, and however limited that commerce may have been she was so far as it went, subject to the legislation of Congress. *She was employed as an instrument of commerce, for whenever* a commodity has began to move, as an article of trade, from one state to another, *commerce, in that commodity, has commenced.* The fact that several different and independent agencies are employed in transporting the commodity, *some acting entirely in one State,* and some acting through two or more States, does, in no respect, affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of commerce." This quotation disposes of the position that the Diamond was not subject to the laws of Congress because she was only plying between Oshkosh and Berlin. She was carrying passengers and freight which came from points and places outside of Wisconsin; that was her constant employment. Like the Daniel Ball, the Diamond did "not run in connection with or in connection of any line of vessels or railways leading to other States;" but she was transporting "goods brought from without the limits of" Wisconsin, destined to places within Wisconsin. She was therefore "engaged in commerce between the States."

By the Act of Congress of the 28th of February, 1871, the steamboat "Diamond" was required to be inspected, licensed, and equipped with safeguards against fire. The plaintiff in error offered evidence tending to show that she was not so equipped or provided. In fact the offer of proof was made broad enough to show that not a single requirement of the act had been complied with. This testimony was offered as a defense to the action by the terms of the policy; and, if it did not amount in law to a complete defense, to show the facts as evidence for the consideration of the jury, tending to prove that the loss was in consequence of the "neglect" to comply with the provisions of this law. All of the testimony was rejected by the Court, and the Supreme Court affirm the ruling, on the ground that the Fox River was not "a navigable water of the United States." It is this ruling of the Supreme Court on this point, of which the plaintiff in error complains. If the Fox River is a "navigable water of the United States," then the evidence offered by the plaintiff in error is competent in both aspects in which it was offered. The question, therefore, of whether Fox and Wolf Rivers, or either of them, are "navigable waters of the United States," so that steamboats of the character of the Diamond, navigating these rivers, must be enrolled, licensed, and equipped, as provided by the laws of Congress, becomes of vital importance to a correct determination of the issues of fact in this suit.

H. M. FINCH,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

No. 296.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

JOHN F. MORSE and
CHARLES C. PAIGE,
Defendants in Error.

BRIEF.

H. M. FINCH,
Of Counsel for
PLAINTIFF IN ERROR.
Milwaukee, Wis.

LAWRENCE MILLER, Law and Commercial Printer, 116 Michigan St., Milwaukee, Wis.

SUPREME COURT

OF THE

UNITED STATES.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs

JOHN F. MORSE AND CHARLES C. PAIGE,
Defendants in Error.

STATEMENT OF THE CASE.

This action was commenced in the Circuit Court of Winnebago County, in the State of Wisconsin, to recover an amount alleged to be due upon a Policy of Insurance issued by the plaintiff in error to the defendants in error, upon the steamboat Diamond. The Diamond was a steamer engaged in transporting passengers and merchandise on the Fox and Wolf Rivers, between Oshkosh and Berlin, and was destroyed by a fire which originated on board of the steamer while lying at her dock at Berlin.

The plaintiff in error is a corporation created under and

by virtue of the laws of the State of New York, and having its office and principal place of business in the city of New York.

By Chapter 56, Section 22, Laws of Wisconsin of 1870, it is declared that "it shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take, risk, or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar corporations formed under the provisions of this act, and any such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, containing *an agreement that such Company will not remove the suit for trial into the United States Circuit Court or Federal Courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted.*" (Laws of 1870, Chapter 56, Section 22, page 87, or 1st Taylor's Statutes, page 958, Section 22.)

The plaintiff in error, desiring to do business in the State of Wisconsin, complied with this law, by filing in the office of the Secretary of State, papers, copies of which are printed on pages 31 and 32 of the printed case.

One of the papers thus filed names Henry S. Durand, of Racine, as the "true and lawful attorney on whom all process may be served" on the corporation, and also contains this clause: "*And said Company agrees that suits commenced in the State Courts of Wisconsin shall not be removed by the act of said Company into the United States Circuit or Federal Courts.*" The other paper is the resolution of the Board of Directors, authorizing the appointment of Henry S. Durand. The resolution does not authorize the insertion of the clause in the stipulation by which this Company agrees not to remove causes brought against it in the Courts of the State of Wisconsin into the Federal Courts.

The defendants in error, at the time this suit was commenced, were, and still are citizens of the State of Wisconsin.

The plaintiff in error duly entered its appearance in this cause, in the Circuit Court of Winnebago County, and at the time of entering its appearance, filed a petition to remove the cause into the United States Circuit Court for the Eastern District of Wisconsin. The appearance and petition will be found on page 18 of the printed case. The petition alleges all the necessary facts required by the 12th Section of the Act of Congress of 1789, to remove a cause from a State Court into the Federal Court. A bond, of the character prescribed by the act of 1789, was also tendered. A copy of the bond is on page 19 of the printed case. Upon these papers an order to show cause why the prayer

of the petition should not be granted was obtained, and duly served upon the defendants.

On the hearing of that order, a certified copy of the stipulation and resolution of the Company, filed in the office of the Secretary of State, was read as a conclusive answer to the petition. *The application to remove the cause into the Federal Court was denied.* The order denying the application will be found on page 26. On the refusal to grant the removal, the plaintiff in error answered the complaint. The answer denied the material allegations of the complaint, and alleged, as a second and further defence, that Fox and Wolf Rivers were navigable waters of the United States, and that the steamboat Diamond was engaged in the transportation of passengers and merchandise destined to points and places outside of the State of Wisconsin; that Fox and Wolf Rivers "*formed a continuous line of navigation from the waters of Lake Michigan to the Mississippi River*, and that merchandise from points and places other than the State of Wisconsin, is carried on said rivers," and that the cause of action is one "civil and maritime," and within the exclusive jurisdiction of the District Court of the United States for the Eastern District of Wisconsin.

On the trial in the Circuit Court of Winnebago county, the plaintiff in error claimed and insisted that the Fox and Wolf Rivers were navigable waters of the United States, and that the steamboat "Diamond," being engaged in the transportation of passengers and merchandise on said

waters, was subject to all of the provisions of the Act of Congress, approved February 28th, 1871, entitled "An Act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." (Laws 1871, page 444.)

And it was further claimed by the plaintiff in error, that the steamer was destroyed by a fire occasioned by the "neglect" of her owners to provide the necessary and proper safeguards against fire, required by the act of Congress. The policy provides, among other things, that the Company shall not be liable by virtue of the policy, for any loss in consequence, or by reason "of any neglect or deviation from the laws, or regulations of the police, where such exist." The evidence which plaintiff in error claims shows, or tends to show, the Fox River to be a "navigable water of the United States," will be found at folio 73, page 35, and folio 91, page 40, of the printed case. All of this evidence was excluded on the trial, and a verdict was rendered in favor of the defendants in error, and judgment entered thereon for the full amount due on the policy. An appeal from this judgment was taken to the Supreme Court of the State of Wisconsin. The judgment was affirmed. The opinion is printed on pages 43 to 48 of the printed case. The case is reported in the 30th Wisconsin Reports, page 496.

The cause is brought into this Court under and by virtue of the 25th Section of the Judiciary Act of 1789.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following as errors in the record.

1st. That the Supreme Court of Wisconsin erred in affirming the order of the Circuit Court of Winnebago County refusing to grant the prayer of the petition to remove the cause into the Federal Court.

2d. In holding valid the act of the Legislature of the State of Wisconsin compelling foreign insurance companies, as a condition to doing business in the State, to stipulate that they will not remove any suit brought against them in the Courts of Wisconsin into the Federal Courts.

3d. In holding that the stipulation given by the Insurance Company in compliance with said act of the Legislature was valid, and sufficient in its terms to bar the application or removal.

4th. In holding that Fox and Wolf Rivers are not navigable waters of the United States.

ARGUMENT.

I.

The Circuit Court of Winnebago County had no power to hear or adjudicate upon the validity of the agreement between the Insurance Company and the State of Wisconsin.

The petition for the removal of this cause was made at the proper time and in the proper manner, and every re-

quirement of the Act of Congress was strictly complied with. By the Act of Congress it was made the imperative duty of the State Court "*to accept the surety and proceed no further in the cause.*" The point we wish to make, and which we wish definitely settled by the adjudication of this Court is that the State Court had no power, (after all of the requirements of the law had been complied with by the party applying to remove the suit,) to do any act except to accept the surety; it could try no question of fact, after it was satisfied that the amount in dispute exceeded five hundred dollars, exclusive of costs; its jurisdiction then ceased. It could not try the question as to the effect of an outside agreement between the parties to the suit, or between the applicant and the State of Wisconsin. It could listen to no excuses or reasons which might be thereafter alleged or set up. It, in short, is to "*proceed no further in the cause.*" If the parties had previously entered into a written stipulation that in any action which might be commenced by either against the other in a State Court, no application for removal into the Federal Court should be made, the State Court had no authority to pass upon the validity of the stipulation. The only tribunal authorized to entertain any motion on the effect of that stipulation is the Federal Court. On a motion made in that Court to remand the cause to the State Court, the effect of such an agreement to take away jurisdiction might be heard and determined. In other words, after a proper petition is filed and bond given, every reason to be assigned and every excuse

to be offered against the right of removal, is to be heard in the Federal Court. That Court alone possesses jurisdiction to hear and determine whether the alleged excuses are valid, or such as would prevent the Federal Court from taking jurisdiction. The State Court has no power to adjudicate any question, presented in any form, after the filing of the proper petition, and the offer of sufficient surety. To do so is a palpable violation of the act of Congress.

If this point is decided in accordance with these views, it will put an end to all the strife and discussion constantly arising in the State Courts on these applications. The decision of this Court, directly on the point, will doubtless be followed by the State Courts without murmur or dissent. It is the habit of some of the State Courts to treat unfavorably applications to remove cases into the Federal Courts, and to listen to and pass upon questions of fact not authorized by the act of Congress. If, therefore, this Honorable Court shall declare, in express terms, that when a proper petition is filed and bond tendered, the State "courts have *no power but to accept the surety*," a plain and simple rule will be laid down—a rule easily followed—and a rule that will secure the right of removal given by the act of Congress. We think this very case illustrates the necessity of this rule. The Insurance Company, the defendant, strictly complied with the law of Congress. It was met by an alleged waiver of its right, by an alleged stipulation extorted from it by an act of the Legislature of the State of Wisconsin. The State Court, instead of removing the cause—

instead of adhering to the law that "it should accept the surety and proceed no further in the cause," proceeded to take jurisdiction—to examine the validity of the alleged contract—to adjudge the contract valid—and to hold that in consequence, or by reason of the stipulation, it still had jurisdiction. Having reached that conclusion, it, in effect, ordered the defendant to answer the complaint, and the State Court forthwith *proceeded to try the case on the merits.* The State Court, in other words, nullified and made of no effect the law of Congress. The Court did not find the allegations of the petition, asking for the removal, to be false, or that the bond was insufficient, or that anything was wanting required by the Act of Congress to entitle the party to a removal, but it permitted the plaintiff to offer in evidence, to prevent a removal, alleged reasons not assigned or contemplated by the act of Congress, and having adjudged them sufficient to prevent the application took and retained jurisdiction of the case. By this action of the State Court, the plaintiff in error was deprived of the right of removal expressly given by the law of Congress, and was compelled to submit to a trial in a local Court, and to contend with local prejudices. What we claim is that all of the proceedings in the State Court, subsequent to the filing of the petition and giving the bond, should have been in the Federal Court. The State Court should have "accepted the surety and proceeded no further in the cause." This point we deem amply sufficient to secure a reversal of this judgment.

Hatch vs. Chicago, R. I. P. R. Co., 6th Blatch., 105.

Gordon vs. Longest, 16 Peters, 97.

Kanouse vs. Martin, 15 Howard, 198.

In the last case, CURTIS, J., says, on page 208: "But the Court proceeded to make inquiry into the intention of the plaintiff not to claim of the defendant the whole of the matter then in dispute upon the record, and allowed the the plaintiff to reduce the matter therein in dispute to the sum of $499. *It thus proceeded further in the cause which the act of Congress forbids.* All its subsequent proceedings, including the judgment, were therefore erroneous." But as there are other and important questions presented, (and which we hope will be passed upon and determined,) we proceed to consider them.

II.

The act of the Legislature of the State of Wisconsin requiring foreign Insurance Companies to stipulate that they will not remove suits commenced against them in the Courts of the State into the Federal Courts is unconstitutional and void.

1st. *The right to sue and be sued in the Federal Courts depends upon the constitution and laws of the United States.* That right cannot be enlarged, abridged or taken away by any legislation of the States. Any attempt, by the States, to take away, impair or destroy that right, is in direct violation of Article VI., Sec. 2, of the Constitution of the United States which reads as follows: "This Constitution, and the laws of the United States which shall be

made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, *shall be the Supreme law of the land*, and the Judges in every State shall be bound thereby, *anything* in the constitution or laws of any State, to the contrary notwithstanding." Article III, Sections 1 and 2, fix and define the *judicial power* of the United States. That power is vested exclusively in the Courts of the United States. It extends to cases between citizens of different States. It has been often and repeatedly decided by this Court that State legislation cannot enlarge or restrict the jurisdiction of the Federal Courts.

Whitton vs. Railway Co., 13 Wal., 286.

Payne vs. Cook, 7 Wal., 430.

Seydam vs. Broadnax, 14 Peters, 67.

Union Bank vs. Jolly's Ad., 18 How., 503.

Hyde vs. Stone, 20 How., 175.

Moses Taylor, 4 Wallace, 411.

St. Lawrence, 1st Black, 522.

Allen vs. Allen Ex., 3d Wallace Jr., 248.

It being clear then, that the States cannot, by any act of their legislators, take away the jurisdiction of the Federal Courts, and it being equally as clear that the Federal Courts have jurisdiction of cases between *citizens* of different States, it follows that if the legislature of the State of Wisconsin should by law declare that no citizen of a foreign State, sued in the Courts of Wisconsin, should remove a suit into the Federal Court, such legislation would be invalid. If then the fact

can be clearly established that a foreign corporation is so far a "citizen" that it can sue or be sued in the Federal Courts, then it necessarily follows that if any legislation of the State of Wisconsin has impaired or destroyed that right of a foreign corporation, it is void.

2d. *A corporation is so far a "citizen" that it can sue and be sued in the Federal Courts.*

This point has been decided too often to need an extended argument. The Supreme Court of Wisconsin, in *Knorr vs. Home Insurance Company*, 25 Wis., 153, held that the "Home Insurance Company" of New York, although it had appointed an agent in the State of Wisconsin upon whom process could be served, as required by the Wisconsin law, was still so far a "citizen" of New York, that it could apply to remove a cause into the Federal Court which was commenced in the State Court by a citizen of the State, and directed an order to be entered accepting the surety, and staying proceedings in the State Court.

In *Paul vs. Virginia*, 9th Wallace, 168, Justice Field declares that the Courts of the United States "will treat a corporation as *a citizen* within the clause of the constitution extending the judicial power of the United States to controversies between *citizens* of different States." The Supreme Court of Ohio, in *Shelby et als. vs. Hoffman*, 7th Ohio State, 450, say that "a corporation created by and transacting business in a certain State, is to be deemed an inhabitant of that State, and capable of being treated as a citizen for all purposes of suing and being sued."

The following cases are also to the point that for the purpose of "suing and being sued" corporations are "citizens."

Express Company vs. Kountze Brothers, 8th Wallace, 342.

Hatch vs. Chicago, R. I. P. R. R. Co., 6th Blatchford, 105.

LaFayette Ins. Co. vs. French, 18 How., 404.

Louisville R. R. Co. vs. Letton, 2 do. 497.

Marshall vs. Balt. O. R. Co., 16 *do.*, 314.

Wheeler vs. Ohio & Miss. Co., 1st Black., 286.

Combes vs. Mercer Co., 7 Wallace, 118.

Whitton vs. C. N. W. R. Co., 13 *do.*, 286.

Morton vs. Mutual Ins. Co., 105 Mass., 141.

Every suit brought by or against a corporation in the Federal Courts, and prosecuted therein to a final judgment, is a confirmation of the "*suability*" of corporations in the Federal Courts, on the ground that they are "citizens," within the clause of the constitution extending the judicial power of the United States to controversies between "citizens" of different States.

If this argument is sound, then it conclusively establishes the unconstitutionality of so much of the law of the State of Wisconsin as compels foreign insurance companies to stipulate that they will not remove suits brought against them in the Courts of Wisconsin into the Federal Courts.

The right to remove a cause from the State Court into the Federal Court exists only by virtue of a law of Congress.

The 12th section of the Judiciary Act reads as follows: "If a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State (we add a *corporation* of another State) and the matter in dispute exceeds the aforesaid value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the District where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and for his also there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety and proceed no farther in the cause, and having entered as aforesaid in such Courts of the United States, the cause shall then proceed in the same manner as if it had been brought there by original process."

This law was strictly complied with by the plaintiff in error. The case was a proper one for removal; and the removal would have been granted but *for an act of the legislature of the State of Wisconsin, and a stipulation extorted from the party by virtue of that act.*

Here, then, is a direct attempt, by the legislature of the State of Wisconsin, to take away the jurisdiction of the Federal Court in a confessedly clear case of juris-

diction. It is a bold attempt to nullify an act of Congress.

It cannot be denied that the above section, cited from the act of Congress, is a law made in "pursuance of the Constitution of the United States," and that it is a valid law, and that a corporation is a "citizen" within the true intent and meaning of the act. As such, it is the "supreme law" of the land. The Supreme Court of Wisconsin is not bold enough to assert the contrary. His Honor, the Chief Justice of that Court, in his opinion in the case, says:—"That the question differs very widely from that which would be presented, were the case of a natural person, *a citizen* of another State, endowed with the *full rights* of an individual and subject to no disabilities." With all due respect to our able and honored Chief Justice, we say that there is no wide difference in the case. "Corporations" are "citizens," under "no disabilities," and with the "full rights of an individual," so far as the right "*to sue or be sued*" *in the Federal Courts* is concerned.

He further says: "It is not a question of the same kind, at all, in substance or effect, as it would be if the act and agreement *involved the violation of some positive law of Congress*, as a law relating to taxation by the United States, or laws regulating trade, commerce and navigation, or the carrying business between the States." Here, again, is the same mistake; and, with like due respect to the learned Judge, we respectfully submit that the act of the legislature of the State of Wisconsin does "involve the

violation of some positive law of Congress." The law of Congress conferring the right of removal is as obligatory and "positive," and as binding on the Judges of the Supreme Court of the State of Wisconsin, in a proper case, as a "law relating to taxation by the United States,"—or any of the other laws mentioned. The Chief Justice frankly admits that the question "comes back to one of competency on the part of this Company to waive or surrender a *right or privilege* which it had, and which it could accept or reject as it chose, *and* also one of POWER on the part of *the State legislature to exact such waiver or surrender as one of the conditions of permitting the company to do business in the State.*" Precisely so! In other words, the precise question is, can the State of Wisconsin "*exact*" such a waiver or surrender as one of the conditions of admitting a foreign corporation within its border. If so, then the State, by its legislation, can set aside and annul "*a positive law*" of the United States and can defeat the jurisdiction of the Federal Courts in a large class of cases. The provisions of the Constitution under discussion, say that the laws of the United States made in pursuance of the Constitution of the United States "*shall be the supreme law*," and that "*the Judges in every State shall be bound thereby.*" This clause of the Constitution makes no distinction between "positive" and any other laws of the United States. The only questions in every case is whether the law in question is a valid "law of Congress," made "in pursu-

ance of the Constitution." The distinction made by the Chief Justice between "some positive law of Congress" and the right of removal of a cause from a State Court into the Federal Court under a valid law of Congress, is too subtle and refined to be fully appreciated. Every valid act of Congress is "a positive law," in the sense that it *is a supreme* and binding law. And, therefore, the Chief Justice, in this very case, had just as "positive" a law of Congress—and a law just as binding upon him when asked to grant a removal of this cause upon the petition filed and bond given, as if he had been called to pass upon a valid law of Congress "regulating trade, commerce and navigation." The "law" giving a right of removal in a proper case, from a State Court to a Federal Court, is just as "positive" in its character, and entitled to the same obedience from the Supreme Court of the State of Wisconsin as any other valid law of Congress. The Constitution of the United States so declares it to be.

If the position is tenable, then we are brought back to the question: Does not this law attempt to take away the jurisdiction of the Federal Courts in a large class of cases? Is it not an attempt to deprive the Federal Courts of jurisdiction in every suit brought against foreign insurance companies in the Courts of the State of Wisconsin? If so, is it not unconstitutional? Is not the State legislating upon that which is exclusively vested in Congress? The practical answer to this question is shown by this very case. The plaintiff in error has been deprived of the right given

it by the 12th Section of the Judiciary Act, and the Federal Court has been effectually deprived of its jurisdiction. And what has been true of this case is, or may be, true of all other suits that may be instituted in the Courts of Wisconsin against foreign corporations; and by consequence, all jurisdiction of the Federal Courts, in cases between citizens of the State of Wisconsin and foreign corporations doing business in that State, *is wiped out by State legislation.* The effect of the State law is that the Wisconsin State Courts have exclusive jurisdiction of all litigation that may arise between her own citizens and these foreign companies. The result of this is that the act of Congress is not the "supreme law" of the land. It is virtually abrogated and repealed by State legislation. It seems unnecessary to further comment upon its invalidity.

3d. *The stipulation filed in the office of the Secretary of State, so far as it contains a covenant on the part of the corporation not to remove any cause brought against it in the Courts of Wisconsin into the Federal Court, is invalid.*

It is claimed that the so-called "agreement" is a "waiver" of the right of removal expressly given by a law of the United States. It is said that parties may, "by stipulation or covenant, deliberately and fairly entered into beforehand, bargain away and estop" themselves from setting up, claiming or asserting the right so given. We answer this position as follows:

1st. *The State had no power to impose this particular clause of the agreement.*

The State could not do that indirectly which it had not power to do directly. If it could not prohibit a removal of a suit against a foreign corporation by a direct act of legislation, it could not resort to the "dodge" or "subterfuge" of a forced stipulation or covenant by the party that the cause should not be removed. In *Wayman vs. Southard*, 10th Wheaton, 1, Chief Justice MARSHALL says: "*It is a general rule that what can not be done directly from defect of power cannot be done indirectly.*" In this case, the Chief Justice of the Supreme Court of Wisconsin, in his opinion, says: "It may be conceded that any State legislation intended or calculated of itself, or by its own mere force, to defeat or prevent the exercise of the right of removal, where it exists, is unconstitutional and void." But because Congress has not "in the exercise of its plenary power," withdrawn "all jurisdiction from the State Courts" in the class of cases to which this belongs,—that is, as between "citizens of different States,"—but has allowed the State Courts to retain jurisdiction in such cases, until the non-resident has applied for removal, and complied with the requirements of the law, the case presents, he thinks, another and different question, to-wit: the right of the party by express contract, to waive the jurisdiction. This is strange and inconsistent logic. The jurisdiction of the Federal Court was as "exclusive" in this case, after the requirements of the act of Congress had been fulfilled, as it would have been had Congress declared the jurisdiction "exclusive" in the first instance. Congress has the power,

within constitutional limitations, to prescribe the conditions necessary to give jurisdiction in the Federal Courts in *all cases* between citizens of different States, and when these conditions are complied with, the jurisdiction of the Federal Courts becomes and is "exclusive." Can the State say that other and different conditions and requirements shall be necessary? Clearly not. (*Wayman vs. Southard supra.*) Has the State, then, any power to say that foreign corporations shall *stipulate away the provisions of an act of Congress, giving a right of removal into the Federal Courts?* It is said by the Supreme Court of Wisconsin, that the State has that power for the reason that it may exclude a foreign corporation from its borders, and the argument is that having the absolute power to exclude, the State may admit the corporation upon any terms and conditions it pleases; that the power to exclude gives the power to permit, upon terms resting solely in the discretion of the State, and, therefore, the State may require, as a valid condition, the making of a stipulation which shall oust the Federal Court of jurisdiction in the cases provided by an act of Congress. This proposition is startling. If true to the extent claimed, then there is no limit to the power of the State to impose conditions or restrictions upon foreign corporations doing business in the State. It may impose the condition that no such foreign company shall ever make a defence to an action; that it shall never, under any circumstances, demand a trial by jury; that all suits shall be tried before a particular judge, or only

in an inferior Court, and that it waive all right of appeal to any higher tribunal. The broad proposition, as it seems to us, must be asserted and maintained that the State has the power to impose upon foreign corporations just such conditions as it pleases—or there must be a well defined limit to the power. We think there is a limit. The Constitution and laws of the United States fix the limit. They are the "supreme law."

In the *La Fayette Insurance Company vs. French*, 18th Howard, 407, CURTIS, J., says: "A corporation created by Indiana, can transact business in Ohio, only with the consent, express or implied, of the latter State. (13 Pet., 519.) This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this Court, *provided*, they are not repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

And Justice NELSON, in *Ducat vs. The City of Chicago*, 10 Wallace, 410, says:—"The power to *discriminate* between her own domestic corporations and those of other States desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to. * * * As to the *nature* or *degree of discrimination* it belongs to the State to determine, *subject only to such*

limitations on her sovereignty as may be found in the fundamental law of the Union."

These quotations are sufficient to show that there is *a limit to the power of the State to impose conditions.* It cannot cut off all the legal rights of corporations by exacting from them as a condition to coming within its border a wanton and unjust covenant or contract—and particularly has the State no power to impose any conditions "repugnant to the constitution and laws of the United States."

2*d.* This argument brings us to consider, in the second place, *the legal effect of the alleged contract extorted from the plaintiff in error.* This must be settled by reference to common law rules.

We premise this point by saying, in the language of Justice GRIER, in *Marshall vs. Balt. & O. R. R. Co.*, 16th Howard, 329, that "*the right of choosing an impartial tribunal is a privilege of no small practical importance*, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers, and the combined wealth wielded by corporations in almost every State. It is of importance, also, to corporations themselves, that they should have the same privileges in other States where *local prejudices or jealousy might injuriously affect them.*"

The question then, is, whether the stipulation extorted from the plaintiff in error by the State of Wisconsin, (and given by it because compelled to do so) that it would not remove any suit brought against it in the Courts of Wis-

consin, *is* or can be *a bar to a proper application made for a removal.*

The question is new in the Federal Courts. The Supreme Courts of Wisconsin and Michigan affirm its validity to the extent that the contract will bar the application for removal. The plaintiff in error asserts the contrary.

In *Nute vs. Hamilton Ins. Co.*, 6th Gray, 174, a by-law of the Company contained a provision that any suit to recover for any loss, might be brought "*at a proper court, in the county of Essex.*" The action was brought in the county of *Suffolk.* The agreement was set up as a defense, and it was insisted that by force of the agreement the action should have been commenced in *Essex* county. The opinion of Chief Justice SHAW is quite lengthy. At page 179, he commences to discuss this particular provision of the by-law. He concludes as follows: "There being no authority upon which to determine the case, it must be decided upon principle. The question is not without difficulty, but upon the best consideration the Court have been able to give it, they are of opinion that *it is not a good defense to this action, that it was brought in the county of Suffolk and not in the county of Essex*, and, therefore, that the exceptions must be sustained," &c.

In Amesbury et als. vs. Bowditch M. F. Ins. Co., 6th Gray, 596, the same rule was laid down; and in *Cobb vs. N. Eng. M. Ins. Co.*, 6th Gray, 192, is this language: "It is a well settled maxim that parties cannot, by their covenant, give jurisdiction to Courts where the law has not given it, and it seems to follow from the same course of reasoning, *that parties cannot take away jurisdiction where the law has given it.* The Court are, therefore, of opinion that the stipulation in one of the conditions of the policy that in case of loss, *no action shall be brought upon it except in the county of Worcester, is no legal bar to an action in this county, where, by law, the action might*

be brought, if no such condition had been made."

In *Hobbs vs. Manhattan Ins. Co.*, 56 Maine, 421, Chief Justice APPLETON says: "Parties cannot, by any agreements, confer jurisdiction where it is not given by an act of Congress When so given, *they cannot oust the Courts of the United States of the jurisdiction conferred upon them.*"

In *Stephenson vs. P. F. & M. C. Ins. Co.*, 52d Maine, 70, the Court say: "While parties may impose as condition precedent to applications to the Courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the Courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the Courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest Courts of their established jurisdictions; as conditions precedent to an appeal to the Courts, they are void." Many cases are cited in support of the rule thus laid down.

These quotations from the opinions of Courts justly entitled to consideration, affirm the proposition that contracts which attempt to take away the jurisdiction of Courts, are not valid.

The same principle runs through that long line of decisions which hold invalid agreements to leave all matters in dispute to arbitrators, when offered as a bar to a prosecution of suits in Court.

Allegra vs. Maryland Ins. Co., 6th Har. & John., 408.
Randall vs. C. & D. Canal Co., 1st Harrington, 234.
Gray vs. Wilson, 4th Watts, 39.
Ross vs. Nesbit, 2d Gilman, 252.
Haggart vs. Morgan, 4th Sand. Sup. Ct., 198.
Scott vs. Avery, 5 House of Lords, Cases 811.

Scott vs. Corporation, &c., 60 Eng. Ch. 334.

Connor vs. Drake, 1st Ohio State, 166.

In this case, the courts of Wisconsin assumed, after the petition asking for a removal was filed, and bond given, to receive in evidence an alleged contract between the *State of Wisconsin* and the plaintiff in error, and which contract, by its terms, was intended to oust the Federal Court of its lawful jurisdiction, and to adjudge it sufficient in law to bar the application for a removal; such an agreement *between the parties*, according to the reasoning of all of the above cases, would not have had that effect.

There is another class of cases which affirm principles that would, and which ought to defeat this alleged "waiver" of jurisdiction of the Federal Courts. They are cases where parties have sought, by *so-called contracts*, to set aside exemptions allowed by law. Of such a character, are the cases of *Maxwell vs. Reed*, 7th Wis., 582, and *Crawford vs. Lockwood*, 9th How., Prac. Rep. 547, cited with approval in *Shapley vs. Abbott*, 42d N. Y., 443.

In the case of *Maxwell vs. Reed*, the question is forcibly put: "*Can the contracting parties not only repeal a statute, but upset the Constitution?*" So we say of this so-called "agreement," and which is claimed to amount to a "waiver." Can it, (considering that all policy holders are parties to it, and can avail themselves of its provisions, in every case in which the Insurance Company makes an application to remove a case commenced in the State Court, into the Federal Court, to defeat the application,) not only "upset the constitution" of the United States, but also render null and void the provisions of the judiciary act of 1789, which give an unquestioned right to remove this cause into the Federal Court? Is it the *policy of the law* to uphold such contracts?

The cases of *Davis vs. Packard*, 6 Peters, 41, S. C. 7

Peters, 284; and *Dudley vs. Mayhew*, 3d Comstock, 1, will illustrate this point.

In the first case, (*Davis vs. Packard,*) the defendant was "Consul General of his majesty the King of Saxony." He was duly qualified and was residing in the United States. He was sued in the State Court. He appeared in the suit, but did not plead his privilege. Judgment went against him. The case was carried to the Court of Errors of the State. In that Court, he urged as error in fact, that he was a foreign Consul. To this assignment of error, a plea was filed, denying that the record showed any such fact. The judgment of the lower Court was affirmed, and the cause was brought into the United States Supreme Court. Justice THOMPSON, on page 284, says: "We cannot but consider the judgment of the State Court *in direct opposition to the act of Congress which excludes the jurisdiction of the State Courts in suits against Consuls.* But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the Supreme Court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government, which the Consul represents. * * * If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. *Higher considerations of public policy doubtless led to the provision.*"

It cannot be claimed that a stipulation made before a suit is instituted, can be a more emphatic "waiver" of jurisdiction, than an appearance actually entered in a suit pending. And yet the reasoning of Justice THOMPSON would preclude a foreign Consul from stipulating away the jurisdiction of the Federal Courts in a suit brought against him; and one reason

given, is that if the right was a mere personal privilege, "it can hardly be supposed that it would have been thought sufficiently important to require a special provision in the constitution and laws of the United States." Congress has thought the right of a citizen of a foreign state, "to sue or be sued," in the Federal Courts, of sufficient importance to require "a special provision in the constitution and laws of the United States." Would it have so provided if the foreign "citizen" could by agreements made beforehand render *null and void those provisions*? If, when the conditions of the 12th section of the judiciary act of Congress of 1789 are fully complied with, the jurisdiction of the Federal Court is "exclusive," then, is it not as much against the *policy of the law* to permit parties *to stipulate away that jurisdiction* in such case, as in the case of a foreign Consul? Is there any difference in principle between the two cases? Will not the same reason apply in the one case as in the other? Where is the line of distinction? Congress has legislated just as clearly and plainly in the one case as in the other. If the "foreign Consul" cannot stipulate away the jurisdiction, how can the "citizen" do it? The act of Congress is just as emphatic, that when certain steps have been taken in a State Court, a removal shall be granted, as it is that the Federal Courts shall have exclusive jurisdiction in favor of foreign ambassadors. The foreign ambassador *cannot waive the jurisdiction*, because against the policy of the law; and it would seem to follow that the same reason would as clearly prevent the party,

who complies with the provisions of the act of Congress, from contracting away the jurisdiction. Would the "citizen," who has properly made his application for a removal, thereafter have the *right to withdraw it?* The State Court has no power to proceed. It has no power under the act of Congress to enter any order, except "to accept the surety." It would therefore have *no power to enter an order permitting the* withdrawal of the petition and bond. Why? Because the act of Congress, (after filing the proper petition and giving of the proper bond,) has taken away the jurisdiction of the State Court, and vested it exclusively in the Federal Court. The agreement, therefore, is against the *policy of the law.* It is a nullity. It is as worthless as would be the withdrawal or attempted withdrawal by a foreign Consul of a case against himself from the jurisdiction of the Federal Court.

The case of *Dudley vs. Mayhew*, 3d Comstock, 1, was a case where the parties *have expressly agreed that they would not raise the question of jurisdiction.* The action was brought in the State Court to test the validity of a patent. The parties sought by an agreement between themselves to deprive the Federal Courts of a case exclusively within its jurisdiction, and give that jurisdiction to the State Court. The case was dismissed notwithstanding the agreement.. Covenant could not confer jurisdiction where it did not exist. The same reasons that will not allow parties to confer jurisdiction by covenant, ought to be equally as patent to deprive them of the power to contract away the jurisdiction in advance.

Third.—A third reason we urge against the validity of the so-called "waiver," is that *it is only a contract between the State of Wisconsin and the plaintiff in error.* It is not a contract between the parties to this suit. The State of Wisconsin is the only party who can complain of a breach, if any, of the so-called "agreement." It is not easy to understand how the defendants in error, who are not parties to it, were permitted to use a contract made with the State of Wisconsin, to defeat the application for a removal of this cause! The State of Wisconsin is no party to this suit! It seems to us that the only party who can complain of an alleged breach, is the State. How can the defendant's in error legally use this contract in this suit, as a bar to this application? Until the State interferes, no other party can complain. The State, only, could enforce the penalties provided for a violation of the privileges given the corporation, and it only is a party to the contract. The authorities to sustain the proposition, that the State is the proper party to enforce the penalty for a breach of the contract are all collected in a note to section 777, *in Angell and Ames on Corporations.* That section reads as follows: "A cause of forfeiture cannot be taken advantage of or enforced against a corporation collectively or incidentally, or in any other mode, than by a direct proceeding for that purpose, against the corporation, *so that it may have an opportunity to answer*, and the government creating the corporation, can alone institute such a proceeding, since *it may waive a broken condition of a compact with it as well as an individual.*"

Fourth.—A fourth reason we allege is that this so-called agreement, *if the defendants in error had been parties to it is not a waiver or an estoppel.*

The Chief Justice of the Supreme Court of Wisconsin, says: "The question here would seem to be whether it is a privilege of a kind *capable of being waived by the party in whose favor it exists, or such that he may, by stipulation, or covenant deliberately entered into, beforehand, bargain away or estop himself from setting up or taking future advantage of it.*"

Assuming that it is not against the policy of the law for parties to suits to contract or covenant away the jurisdiction of Courts, and that the defendants in error are parties to this alleged contract, then the question is whether what was done in this case between the State of Wisconsin and the plaintiff in error, *amounted to a waiver.* To determine this, it is indispensable for us to know *what is essential to a waiver.* This question is so well answered by Justice SELDEN, in *Crawford vs. Lockwood*, 9th Howard's Practice Reports, page 548, that we quote all that he says on this point. Crawford brought an action to recover damages for the alleged taking of certain personal property on execution. The defence was that Crawford had given the note upon which the judgment was rendered containing these words: "*hereby waiving* the benefits of all and every exemption of property from sale on execution, under the laws of the State." The question was as to the validity and effect of this agreement. He says: "The first remark I

have to make then is, *that a waiver is not, and bears no analogy to a contract.* The distinguishing feature of a contract is its mutuality—its *quid pro quo*, or consideration. But no consideration is necessary to support a waiver. It is, in this respect, like a gift, to which, indeed, it bears, in many respects, a close analogy. Gifts can only be made to take effect *in presenti*. *Blackstone* says "a true and proper gift is *always* accompanied with delivery of possession, and takes effect immediately. (2 *Black Com.*, 441.) Of course, then, a gift must be of something *in esse* at the time. There are three things essential to every gift. to-wit: A donor, a donee, and *a thing to be given.* (*Dyer*, 244.) The thing, therefore, must exist at the time, or there can be no gift. This results first, from the import of the term itself. To give, implies *ex vi termini*, a present transfer of the thing. But it also flows as a consequence from that principle of the commmon law, which prevents any contract from being obligatory, unless founded upon a sufficient consideration. So long as the gift is executory, it rests in agreement merely—and the want of consideration is fatal to it. It may be retracted at any time. Nothing short of the execution of the intent to give can make a valid gift. (2 *Black Com.*, 441; *Pearson vs. Pearson*, 7 Johns, 26.) An agreement to give, founded upon a sufficient consideration, would no doubt be valid *as a contract*, but it would transfer no title. The parallel in this respect between a waiver and a gift seem to me to be close, if not perfect. To waive, no less than to give,

implies a present act. If I say I "waive," some *right which I may have next week*, this can mean nothing more than that when the time arrives I will not insist upon the right. *It cannot extinguish a right not yet in esse.* It is executory in its nature, and may, therefore, if without consideration, be retracted at any time; and even if founded on a good consideration, it is still executory, and can take effect as a contract only. It is no answer to say that *the right* existed in this Court, at the time of giving the note, and that nothing was wanting but the occasion for its exercise. *The law*, it is true, existed them, but there could be *no right* to have property exempted from execution until there was an execution. The property itself to which the right attached *may not have had an existence when the note was given.* It is clear, therefore, that there was not an *executed* waiver; in other words, *it was no' a waiver at all, but at most, a mere agreement to waive.*

"There is another analogy which tends with equal force to the same conclusion. By the common law, a release can operate only upon a vested, and not upon a contingent right. *A release of a possibility is void.* For instance, an heir at law cannot release to his father's disseisor, because his heirship, and consequently the right released is contingent. (*Co. Litt.* 265 *a.;* 10 *Coke*, 51.)

"So if a connusee of a statute release to the conusor all his right to the land, he may nevertheless *sue out execution*, because he has only a possibility but, no vested right to the land. (*Co. Litt.* 265 *a; Cro. Eliz.* 552.)

"So if the next presentation to a church be granted to A. and B., and while the incumbent is living, A. releases all his right and title to the presentation to B., this release is void, it being of a right not yet *in esse*. (*Cro. Eliz.* 173; 1 *Leon*, 167; *Dyer* 244; 10 *Coke*, 48.)

"Now, a release and waiver are alike in this, *when valid*, *each operates to extinguish a right*. If then a release cannot extinguish a right, the existence of which depends upon a contingency, how can a waiver do it? Are not the cases parallel in this respect? How can a waiver operate upon that which has no present existence, more effectually than a release? I can see no reason for a distinction, and am forced therefore to the conclusion that *a right not yet in being, but which depends upon a contingency* CANNOT BE THE SUBJECT OF A WAIVER.

"The defendant, however, seeks to apply the principle of *estoppel in pais* to the case, and claims that the plaintiff should be precluded from setting up, and seeking to enforce a right which he had agreed upon sufficient consideration to relinquish.

"But *estoppel in pais* is a rule of evidence, and not a mode of enforcing contracts. It does not appear that the principle has ever been resorted to, to compel a person to perform his engagements, when the facts involved were known to both parties. Its use is to preclude a party from maintaining by evidence that which he has before denied; or disproving that which he has before admitted, when the other party has acted upon the faith of the admission, or de-

nial, in such a manner that he will be injured, unless the same is held conclusive.

It will be seen, therefore, that it is essential to every *estoppel in pais*, that it relate to some *matter of fact* which has been previously admitted or denied by the party claimed to be estopped. An admission by a person as to the law, or as to the legal effect of his contract, is never held to estop him. *Poll's Lessee vs. Robertson*, 1st Term, 463; *Boston Hat Company vs. Messenger*, 2d Pick., 223. It is also necessary that the fact should be one of which the party claiming the benefit of the estoppel, was ignorant. The basis of an *estoppel in pais* is fraud. It is not, it is true, essential that there should have been *an intention to deceive*. But there must have been a confidence reposed which would be betrayed to the injury of one party if the other is permitted to retract his admission or denial. If we test this case by these rules, we shall see that it lacks the principle elements of an *estoppel in pais*. *It relates not to a matter of fact, but to a matter of contract.* There was no fact involved in the transaction, of which the defendant was ignorant; and he must be presumed to have known the law, and the legal effect of his agreement. He could not, therefore, have been deceived in anything, except the expectation that the plaintiff would perform his contract."

If this reasoning is sound, then it is clear that if the "agreement" refers to suits thereafter to be commenced in the State Court, it is not a waiver, and it cannot be used by the defendants in error, as an *estoppel in pais*.

These views close our argument on this point. Since the application was made to remove this cause into the Federal Court, (and, doubtless, to meet this very case,) the legislature of Wisconsin, has enacted the following stringent law. (Chapter 64, Laws of 1872, page 67.)

"AN ACT TO PROVIDE FOR THE ENFORCEMENT OF LAWS IN CERTAIN CASES.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1.—If any insurance company, or association, shall make application to change the venue or remove any suit or action heretofore commenced, or which shall be hereafter commenced in any Court of the State of Wisconsin to the Federal Court, contrary to the provisions of any law of the State of Wisconsin, or contrary to any agreement it has made and filed, or may make and file, as provided and required by section number twenty-two (22) of chapter fifty-six (56) of the General Laws of Wisconsin for the year A. D., 1870, or any other provision of law now in force in said State, or which may hereafter be enacted therein, it shall be the imperative duty of the Secretary of State, or other proper State officer, to revoke and recall any authority, or licence, or certificate to such company, to do and transact any business in the State of Wisconsin, and no renewal, or new license, or certificate shall be granted to such company for three years after such revocation, and such company shall therefore (thereafter) be prohibited from

transacting any business in the State of Wisconsin, until again duly licensed.

SECTION 2.—In case any insurance company, or association, incorporated by or organized under the laws of any other State of the United States, or any foreign government shall have, previous to the passage of this act, made application to any court of this State, to change the venue or place of trial to the Federal Courts, or United States Circuit or District Courts, in any suit commenced or pending in such State Court, contrary to the provisions of said chapter fifty-six (56) of the General Laws of Wisconsin for the year A. D., 1870, or any other law of said State, or contrary to any agreement which said company or association may have made and filed, according to section 22, of chapter 56, of the General Laws of Wisconsin for 1870, or any other law of said State, *and an order has not been made by such State Court, or the judge thereof, changing the venue or place of trial to the said United States or Federal Courts*, unless such company shall, within sixty days after the passage and publication of this act, *make and file in such action in whatever Court the same may be pending, a stipulation withdrawing such application and wholly abandoning the same* the Secretary of State, or other proper State officers, shall recall and revoke any license, certificate or authority to such company to do business in the State of Wisconsin, and in case any such company or association shall refuse or neglect to make and file such stipulation as above provided, such company or association *shall be*

prohibited from doing or carrying on business in the State until again duly licensed, as hereinbefore provided, and no new license, or renewal of license, or certificate shall be granted to such company or association, to do or transact any business in the State of Wisconsin, for three years next after its neglecting to make and file such a stipulation.

SECTION 3.—Provides that if any such application shall be made contrary to the provisions of chapter 56, or any other general law, or the agreement filed in pursuance thereof, the offending company "shall be liable, in addition, to a penalty of not less than one hundred dollars, or more than five hundred dollars *for each application made or for each offence* so committed for making such application, the same to be recovered by suit in the name of the State of Wisconsin!!" And it is made "*the imperative duty* of the Attorney General of the State of Wisconsin, to see and attend that all of the provisions of said chapter fifty-six, (56) of the General Laws of 1870, and the provisions of this act are duly enforced."

In view of this extraordinary legislation, we respectfully ask this Honorable Court to pass upon the validity of so much of Section 22, Chapter 56, of the General Laws of 1870, as require foreign insurance companies to stipulate as a condition of doing business in the State of Wisconsin that they will not apply to remove suits brought against them in that State into the Federal Courts.

The penalties for the "attempt" to make such an appli-

cation are severe and oppressive. If the right of making the application exists, notwithstanding the stipulation, then we think it should be expressly declared by this Court. As the law now is in the State of Wisconsin, all the severe penalties of the act of 1872, may be visited upon the plaintiff in error, for making this application. All foreign Insurance Companies are debarred from even making an attempt to remove a cause into the Federal Court!

We respectfully submit, that for the reasons given, so much of the act of the Legislature of Wisconsin, as requires the stipulation of foreign Insurance Companies to waive the right of removal, and the stipulation given in pursuance of the act, is null and void.

III.

Are the Fox and Wolf Rivers above Oshkosh, and between Oshkosh and Berlin, public navigable waters of the United States?

This Court, in *The Daniel Ball*, 10 Wal. 563, lays down the following rule: "Those rivers must be regarded as public navigable rivers, in law, which are navigable in fact, and they are navigable in fact, when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be conducted in the customary modes of trade and travel on water *and they constitute navigable waters of the United States*, within the meaning of the acts of Congress,

in contradistinction from the navigable waters of the States, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway, over which commerce is, or may be carried on with other States, or foreign countries in the customary modes in which such commerce is conducted by water."

Apply this test, and there can be no doubt upon this question.

The Fox and Wisconsin Rivers, in the early history of this country, were the great channels of commerce between the Upper Mississippi and the Eastern States. Long before the Union was formed, and when the French were in possession of this territory, these rivers were almost, or quite the only channels of trade between the Upper Mississippi and the Lakes. SMITH, in his history of Wisconsin, says: "At this time, 1718, the three great avenues from the St. Lawrence to the Mississippi were, one by the way of the Fox and Wisconsin Rivers; one by way of Chicago, which had been safely pursued since the days of Marquette; and one by the Miami of the Lakes, when after crossing the portage of three leagues over the summit level, a shallow stream led into the Wabash and the Ohio." (Smith's History of Wisconsin, vol. 1, page 81.) The French had established their trading settlements along these rivers, and many towns still retain the French names given to them at that time. This is the channel through which the immense fur trade with the Northwest was carried on for more than a century.

In fact, so important was this channel of commerce regarded at the time of the cession of the Northwest Territory by Virginia, that to prevent any States from monopolizing the trade upon those rivers, it is expressly provided in the ordinance of 1787, as follows: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and for ever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy without any tax, import or duty therefor."

This provision has been required by Congress and inserted in the constitution of every State formed out of this territory.

In 1846, Congress passed an act, providing "That there be, and hereby is granted to the State of Wisconsin, on the admission of such State into the Union, for the purpose of *improving the navigation of the Fox and Wisconsin Rivers*, in the territory of Wisconsin, and of constructing *the canal* to unite the said rivers at or near the portage, a quantity of land, equal to one-half of three sections in width, on each side of the said Fox River, and the lakes through which it passes, from its mouth to the point where the *portage canal* shall enter the same, and on each side of the said canal from one stream to the other, reserving the alternate sections to the United States, to be selected under the direction of the governor of said State, and such selection to be approved by the President of the United States. The said river, when

improved, and the said canal when finished, *shall be and forever remain a public highway for the use of the Government of the United States, free* from any toll or other charge whatever, for the transportation of the mails, or for any property of the United States, or persons in their service, passing up or along the same."

In 1870, an act was passed, which authorized the general government to take the entire work.

This last act was passed in response to memorials and petitions from several States, representing the importance of these rivers as a channel of commerce between the States.

The act of Congress, first cited, in effect declares, that the Fox and Wisconsin Rivers are navigable streams, for the act makes an appropriation to improve the navigation, and the appropriation itself is evidence that it was regarded as an important channel of inter-state commerce. A canal was required to be made at the portage between the two rivers; all these improvements were made for the benefit of commerce.

Before these improvements, these rivers had been used for more than a century, as the channels of foreign and inter-State trade. Does the fact that Congress has donated a valuable land grant to *improve* the navigation of these rivers, and that they have been improved, divest them of the character of "public navigable waters of the United States?" Is the Ohio River any the less a "navgiable water of the United States," because of the canal at or near Louisville, through which steamboats pass up and down around the falls

at or near that city ? Improvement of the navigation of those rivers, even if it is carried to the extent of building an artificial channel, cannot change them as "public navigable waters of the United States." This question has recently been most thoroughly examined by the Hon. H. H. Emmons, U. S. Circuit Judge, in the case of the Avon. His opinion is printed at length in vol. 6, page 61, of the Chicago Legal News. This was a case of collision, occurring between two vessels in the Welland Canal—*wholly an artificial channel*—and the question was, whether a maritime lien existed on the colliding vessel.

In his opinion in that case, Judge Emmons says: "There are few harbors in the Northwest which are not entered through *wholly artificial passages*. It would be most impolitic to say a ship in passing through our St. Mary's canal, between Lakes Huron and Superior, is beyond the process of the admiralty. A large portion of the commerce of the latter lake will soon pass through the Portage Lake Canal. The St. Clair Flats are now so crossed by a similar channel, through which passes as much inter-national commerce as through any waters on the continent. The Suez Canal, those of Venice, Amsterdam, Rotterdam, and the great Northern Canal and Basins in Holland, and all the improved navigation of the world have been, and from the nature of their use, should be as much subject to the admiralty jurisdiction as waters in natural channels."

It was admitted on the trial of this case,, (printed case, page 35,) " that the waters of the Fox River empty into Green

Bay, and that Green Bay is water connecting with Lake Michigan and Lake Huron into Lake Erie, and Lake Erie into Lake Ontario, and Lake Ontario into the River St. Lawrence, and the River St. Lawrence into the Atlantic Ocean; and that steamboats have navigated the Fox River from Oshkosh to Green Bay, and to points outside of the State of Wisconsin, carrying passengers and merchandize to points and places other than in the State of Wisconsin, for the past fifteen years; and it was admitted that the steamboat Diamond carried both passengers and merchandize which came from outside of Wisconsin, on the Fox and Wolf Rivers, between Oshkosh and Berlin."

It is clearly established by this admission, that the Fox River on which the steamboat Diamond was being navigated, did by itself, and by uniting with other waters, form a continued highway, over which commerce is actually carried on with other States and foreign countries in the customary modes in which such commerce is conducted by water, within the rule laid down in the *Daniel Ball*, in the 10th of Wallace.

It is just as clearly established, by the admission of counsel, that the steamboat Diamond was employed in transporting passengers and merchandize destined to, and coming from other States. In other words, she was engaged in inter-state commerce. By the act of Congress, of the 28th of February, 1871, she was required to be inspected, licensed, and equipped with certain safeguards against fire.

The plaintiff in error offered evidence tending to show that she was not so equipped or provided. In fact, the offer of

In Supreme Court

OF THE

United States

THE HOME INS. CO., of N. Y., Pl'ff in Error,

AGAINST

JOHN F. MORSE, et. al., Deft. in Error.

BRIEF AND POINTS.

JOHN W. CARY,
Att'y for Deft. in Error.

GABE BOUCK, of Counsel.

In Supreme Court

—OF THE—

UNITED STATES.

FROM SUPREME COURT OF THE STATE OF WISCONSIN.

THE HOME INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,

against

JOHN F. MORSE, Et Al., Defendants in Error.

FIRST.

That corporations created by the laws of one state, have not the absolute right to recognition, and to do business in another state, is not a subject for argument; the question has been adjudicated by this court.

Bank of Augusta vs Earl, 13 Peters, R. 519; Paul vs Virginia, 8 Wal. 168, and cases there cited; The People vs Murray, 5 Hill, 668.

Therefore, in the language of this court, (8 Wal.) if a state corporation has no rights in states, other than in the one in which created, except "by the permission, express or implied of those states." And a state has an absolute right to prohibit a Foreign Corporation, from doing business within its limits, it follows, as a matter of course, that when a state grants permission to do business, to a foreign corporation, it has aright

to impose such terms and conditions as it may see fit; that this necessarily follows is so plain; it would be an insult to the intelligence of this court to argue the same. Therefore, the only point upon the question of removal, is simply the construction of Sec. 22, of Ch. 56, of the Gen. Laws of Wisconsin for 1870. Whether the contract, or stipulation therein required, runs or inures only to the state, but also to state and each policy holder.

This provision is for the benefit of the assured, and inserted for an eminently wise and beneficient purpose, to-wit: to give the assured what our constitution guarantees, a certain remedy, without delay. That he shall not be compelled to go a great distance from his home to assert his claims, that in case he desires to enjoy the benefit of a writ of error, or an appeal, he shall not be subjected to the expense of taking the same to the distant court at Washington. It virtually amounts to this, these foreign companies say to the state, we wish to do business in the state; the state replies, if we permit you, and any of our people suffer a loss. under existing laws, if you refuse to pay you can subject them to the great inconvenience of going a long distance from their homes, &c., to enforce their rights, &c., but the state says to these companies, to avoid this, we will give consent to your doing business within its bounds, provided you will agree to waive your rights, under the act of congress, and consent that all litigation shall be in the State Courts; the companies answer, for the privilege, we consent. With such under standing, they are permitted to do business, and now claim that they are not bound by this agreement.

Even if the state law is unconstitutional, the defendant cannot repudiate the same, there is no question but what the state can prohibit these foreign companies from doing business in this state, or impose such conditions as it sees fit. Paul vs. Virginia Supra. It is well settled, that a party cannot be allowed to claim under, and at the same time repudiate, &c. Burrows vs. Bashford, et al. 22 Wis. 108, The People vs. Murray, 5 Hill, 468; Van Allen vs.

The Assessors, 3 Wal. 573; Dunmores Appeal, 52 Penn. St. R. 374. The legislature was granting a favor, it could impose its own conditions, it matters not. how much those conditions may conflict with the legal, or constitutional rights of these companies. See the People vs. Murray, 5 Hill 468, the doctrine of which case is fully sustained by this court, in Burrows vs. Bashford, et al., 22 Wis. 108; Van Slyke vs. State, 23 id. 655; Bagnal vs. State, 25 id. 112. Iron Manf. Co. 22 Wis. 417; Arnet vs. Ins. Co. id 516; Ladd vs. Hildebrant, 27 id. 135, 146; Bank of Columbia vs Okely, 4 Wheat. 235.

This contract of insurance was made under this law, the effect of this law, is substantially to provide, that if the assured desire it, the State Court shall have jurisdiction to try the same, and the insurer waives his right to remove to the United States Court, and agrees that the same shall be tried in State Courts, and it is analogous to the law chartering "The Milwaukee M. M. Ins. Co. See Arnet vs. said company, 22 W is. 516. A contract made under the law, is presumed to be made in reference to the same. The law of every state, where a contract is made enters into and makes part of the contract. Blanchard vs. Russel, 13 Mass. 1; Mather vs. Bush, 16 John 238. On the same theory, that the law is part of the contract, contracts are held void, which are contrary to the statute, as for instance, contracts for labor on Sunday, when labor is forbidden on that day. See Sedgwick on St. and Const. Law, p. 85, and cases there cited. Under these adjudications and principles of law, I claim, that under the provisions of this law, the status. of the assured and insurer, is the same, as if the company had put an express condition in the policy, that the insurer should not remove an action upon it, from the State, to the Federal Courts.

Upon this question, see decision of Sup. Ct. of Wis. in this case, 30 Wis. 596; also, the case of the Glens Fall Ins. Co. vs the Judge of the Jackson Circuit, 21 Mich.

580, which is a case, analagous to this, and where the question was directly raised.

As to the constitutionality of this law, there cannot be any question, either in this, or State Courts, unless above cases cited are overruled. The only question is, as before stated, whether is is a contract with both assured and the state. Therefore, it depends wholly upon the construction to be put upon the state law, under which this company claims the right to do business in Wisconsin. Therefore, it belongs to the Sup. Court of Wisconsin to construe the same, and not the United States Court.

It devolves upon the State Court, to put a construction upon the contract made, or stipulation given by this company, as a condition precedent, before it could do business in Wisconsin, whether it inures for the benefit of each policy holder, as it was intended by said law, and for which express purpose it was enacted, and not the United States Court; this I understand to be the law, by numerous decisions of this court.

Query:—Does the removal of cases under the act of Congress, apply to any corporations, other than those created by an act of Congress? Was it the intention of Congress to give State Corporations the same privileges as the citizens of the different states? See Abbotts U. S. Practice, vol. 2, pages 39 and 40.

SECOND.

If this court concludes that the state court erred in its construction of the state law, and this case should have been removed to United States Court, then this court acquires jurisdiction and will examine into the pleadings and proofs, and see if state court erred. There were no errors. The following are points made:

THIRD.

An examination of the pleadings in this case is requested. They are under the code The answer raises no issue. The plaintiff in said suit, would have been entitled to judgment on motion. The only denials of any allegations of the complaint are, that the defendant, the com-

pany, "have no knowledge or information, &c," This is no denial; the allegations attempted to be denied, were such, as the defendant had or could obtain information; the denial should have been positive, and not being so, is no denial at all This question is decided and settled in Schaetzel vs. Germantown, F. M. I. Co., 22 Wis. 412. This decision is in accordance with the uniform decisions of the courts, upon the question, at the least it is the construction which the Supreme Court of Wisconsin puts upon its law, as to pleadings. They not being such facts as the code authorizes to be answered, "that the defendant has no knowledge, &c."

FOURTH.

The answer does not allege any breach of any of the conditions of the policy, or any defensive matter.

On a policy of insurance, the gist of the action is the policy, interest, loss, value and proof of loss, this is all that is required to be alleged or proved, or required to be proved, even if there are any more allegations, to establish a cause of action.

They are all the precedent conditions. The proof of loss is material, because until made, no liability to pay, hence it is a precedent condition. The provisos or conditions are not precedent conditions, they arecontingent and dependent; conditions of defeasance or avoidance, the company can only take advantage thereof. When policy issued, premium paid, there is a valid contract; in case of loss, and proof of interest and value, a prima facie case is made, to defeat the same, the burden rests upon the Insurer.

It would indeed be remarkable, if the assured, in his complaint, and evidence should be compelled to allege and show, that none of the numerous innumerable conditions and provisos contained in this small print Insurance Literature, have not been violated.

Judge Daggett, in Lonnsbury vs Protection Ins. Co. 8 Conn. 466, passes directly upon this question, and clearly expresses the law; he says: "I feel no difficulty on this

"point. All these conditions, if such they may be called, "are inserted in the policy by way of provisos, and not at "all as conditions precedent. They are introduced for "the benefit of the defendant, and they must be taken ad- "vantage of, if at all, by pleading."

The following cases, are also cited upon this question. Hunt vs. Hudson River Ins. Co. 2 Duer 487; Catlin vs Springfield F. Ins. Co. 1 Sumner 639; Hodson, Adm., vs. Guardian L. I. Co. 97 Mass. 144; Forbes vs American Ins. Co. 16 Gray 249; Clark et al. vs. H. M. I. Co,, 9 idem 145; Orrell vs. Hampden L. I. Co. 13 idem 431; Troy F. I. Co. vs Carpenter, 4 Wis. 24; Herron vs Peoria M. L. T. Ins. Co. 28 Ill. 236; Ætna Ins. Co. vs Phelps, 27 Ill. 71; Hackell vs Village of Penn. Van 5 Lans 43.

As to what is proper pleading, by what is known as the common law pleading, before code. See form in vol. 2, Greenleaf's Evid. note to sec. 404. In this form, he does not even require the pleader to set out these conditions, much less to negative the same. These conditions are matters in defeasance, or avoidance, have only the same effect as if upon back of the policy, or in a separate paper, only matters of defence.

It is not only unnecessary for the assured in his complaint, not to negative these provisos, and allege that there has been no breach thereof, but it is absolutely necessary for the Insurer to avail himself of any breach, or violation thereof, to set up in his answer such breach or violation, and thereby notify the assured of his defence. This is a general principle, not only under the code, but also under the commov law pleading. The theory is a plain one, easily to be understood; for an illustration take an action upon an insurance policy, the plaintiff, to recover, must allege a policy, interest, value, loss and proof of loss; these questions the plaintiff only raises in his complaint; they show a cause of action, if the defendant puts in only a general denial, he only put in issue, the above facts, no

others, if the plaintiff shows a policy, loss, value, interest and proof of loss, that ends it If the defendant does not deny the above facts, but claims an avoidance of liability, by breach of any of these provisos, then he can only raise this issue, by setting the same up in the answer. The plaintiff is entitled to notice thereof.

The justice of this rule is pleading, is beautifully illustrated in this case, if defendant was not obliged to set up in his answer the claimed violations of any of such conditions, the plaintiff would be compelled on the trial to be prepared, with witnesses, not only upon each one of these innumerable fine print provisos, contained in one of these policies, but in addition, as is claimed in this case, under one proviso, would be compelled to be prepared to disapprove a violation of any of the provisions contained in a long act of Congress, and of any of the provisions contained in about 500 rules adopted by the commissioners under the same. If this was correct, these rascally insurance companies could never be holed. It is apparent that no other rule of pleadings, except as herein claimed, can be adopted; it is an impossibility.

Let it be remembered, that the defendant in his answer, alleges no breach of any of these provisos, and in fact does not set up any defensive matter.

Upon this question, following cases are cited:

Grosvenor vs. The Atlantic Fire Insurance Company of Brooklyn, 1 Bosw. 469; Hunt vs. H. R. F. Ins. Co. 2 Duer 481; N. Y. Cont. I. Co. vs National P. I Co. 20 Barb, 459; Hawks vs Dodge Co. M. Ins. Co. 11 Wis. 188; Troy F. I. Co. vs Carpenter, 4 idem 20; Gregory vs Hart, 7 id. 531; Gill vs Rice, 13 id. 549; Babb. vs Mackry, 10 id. 371; 23d id. 184; Fitzsimmons vs City F. I. Co. 18 id. 234; Forbes vs A. L. Co. 25 Gray 249; Lownsbury vs P. I. Co. 8 Conn. 465; Clark vs Hamilton Ins. Co. 9 Mass. 145; Ætna Ins. Co. vs Phelps, 57 Ill. 71; Fox vs Conway F. Ins. Co. 53 Me. 107; Flynn vs Merchants M. I. Co. 17 La. An. 135; Pinn vs Merchants &c., Ins. Co. 10 id. 214; Northrup vs Mississippi, &c. I.

Co. 47 Mo. 435. In N. H. & North Co. vs Quinlard, 6 Abb. P, R. N. S. 128, it is held that to be relieved from a contract. by reason of the act of God, it must be set up in answer.

The defendant, or plaintiff in error, may claim that the plaintiff was obliged to prove all the allegations in his complaint. Nonsense. The plaintiff was compelled to prove only the gist of the action, that is to say, what was necessary to show a cause of action.

Dennis vs Snell, 50 Barb. 95; Esselstyn vs Weeks, 12 N. Y. 635; Bedell vs Carlt. 33 id. 581, Conaughty vs Nichols, 42 id. 83.

In Sands vs St. John, 36 Barb. 628, the court holds that if the complaint contains an immaterial allegation. it is unnecessary to deny the same, even if the allegation controverts the defendant's defendant's defensive matter. Thus in an action on a promisory note, if the plaintiff should allege a sufficient cause why the suit was not brought within the time limited by law, the defendant need plead only the statute of limitation, and is not compelled to deny the excuse set up for not bringing action, and which if true, would defeat his plea of the statute of limitation. Delay being one of the purposes of the defence by insurance companies, it is excusable on the part of the pleader in his complaint, to insert many unnecessary allegations, to do away with any excuse for a demurrer, for delay.

FIFTH.

The defendant then attempted to show, that this boat had violated the United States laws. This proof was ruled out for the following reasons: First.—Even, if a proper and sufficient defence, it was not admissible because the defendant had not set the same up in his answer, as defensive matter. See cases heretofore cited. Second.—It is not a defence, it is nonsense, to say that because the plaintiff violated the laws of the United States, relative to the navigation of boats, that this excuses the insurance company. it was supposed, that this law, and others of like

nature, were enacted for the benefit and protection of passengers and freight, and not for the benefit of insurance companies. This law provides a penalty for the violation thereof, and among these penalties, I have not been able to discover a penalty that all insurance shall be forfeited, and insurance companies pocket the same. It is a novel idea, and as a further illustration, suppose a company takes a risk upon a saloon and contents. Some day it burns, up jumps the company, and says I will not pay, because forsooth you had not a license, or perhaps by showing that he sold liquor on Sunday, or to minors, &c. I do not feel disposed to argue this question, because it is so well settled.

I cite: The Phil. Wil. & Balt. Rail. Co, vs Phil. & Havre de Grace Steam Co, 23 How U S. 209; Powhatten Steamboat Co, vs App. K. R. Co, 24 How. U. S. 247; Woodman vs Hubbard, 5 Foster, 67; Mohney vs Cook, 26 Penn 342; Norris vs Littlefield, 35 N. H. 271; Corey vs Bath, id. 530; Merrit vs Eearl, 29 N. Y. 115; Bryant vs Biddeford, 39 Me. 193; Morton vs Gloster, 46 id. 520; Bigelow vs Reed, 51 id. 325; Hamilton vs Goding, 55 id. 428; Baker vs City of Portland, 58 id; Kernhacker vs Railway Co, 3 Ohio St. 170; Bird vs Holbrook, 4 Bingh. 628; Barnes vs Ward, 9 M. G. & S. 420; Binge vs Gardiner, 19 Conn. 507; Datey vs N. & W. R. R. Co, 26 id. 591; Phalen vs Clark, id. 421; Adams vs Gay, 19 Vt. 358; Sargeant vs Butts, 21 id. 99; Banks vs Wertz, 13 Ind. 205; Kidder vs Donstable, 11 Gray, 342; Brown vs Lynn, 31 Pa. St. 510; Nodine vs Doherty, 46 Barb. 52; Sutton vs Town of Wauwatosa, 29 Wis. 21.

It would be a fine thing indeed, if these insurance companies, could avoid a policy upon showing a violation of any of the numerous provisions of this law, and the numerous rules adopted by the wiseacres, under the law. Rule 81, provides that all equipments of a steamer, such as buckets, axes, hose, barrels, tanks, &c., shall be branded with name of steamer, hence forsooth, if a bucket is not branded with name of steamer, insurance companies

need not pay, if axes not branded, need not pay, &c. If this position was law, any insurance upon a boat would be worthless. I apprehend that there is not a boat, but what in some respects violates some of the provisions of this law or of said rules. It is expected they will. They are for the general government of boats, in the navigable waters of the United States, the United States provides a penalty for the violation of these provisions, and the general government uses its judgment, when penalty shall be inflicted. Many of the provisions of the rules and law are impracticable to the waters of the raging Fox, in many places whereof, the passengers can step from the boat to the shore.

To show hardships of this rule, take this case: several years ago, the United States Court of this state, held that the Fox river was not a navigable river, within the provisions of the acts of Congress, &c., and that boats navigating the same, do not come within the provisions thereof. See case of "The Montello," hereafter cited. The same court has recently again so held. Suppose, finally, that this court should hold the Fox river a navigable stream, would it not only be a hardship, but also remarkable, that one of these insurance companies could avoid a loss, under one of these mysterious, obscure, small print provisos, when the courts have not as yet settled, whether said stream comes within the act of Congress, and when all, the government, navigators, &c., are in the dark.

SIXTH.

The Fox river between Oshkosh and Berlin, the route of this boat, is not a navigable river within the provisions of the act of congress, and within the jurisdiction of a court of admiralty, and said act does not reach, or include boats navigating the same. The navigation between Oshkosh and Green Bay by Fox river, is accomplished by means of the canal of the Green Bay and Mississippi Canal Company, around the rapids of Fox river. There are 5 canals, and 18 locks between said points. See evidence. Boats passing through these canals and locks, are com-

pelled to pay toll; the owner of the canal is a private corporation. See laws of Wisconsin. If the admiralty jurisdiction reaches the river, it is indeed a case of remarkable expansion of jurisdiction. Admiralty jurisdiction commenced with the "high seas" and where the "tide ebbs and flows." If it has expanded to streams, made navigable by canals, constructed by private companies, why not let it include trout brooks; prescribing the length of fish poles, the bait, &c., so that some "dead beat," too lazy to work, too proud to steal; can have a sinecure position. Veazie et al. vs Wyman B. S. Moore, 14 Howard U. S. R. 568, is an analagous case.

The river between Bangor and Oldtown was improved by Veazie and others, held not a navigable river, &c., and the court says, "A state law granting to an individu "al, an exclusive right to navigate the waters of the Pe- "nobscot river, lying wholly within the limits of the state "separated from tide water by falls, impassable for the "purpose of navigation, and not forming a part of any "continuous track of commerce, between two or more "states, or foreign country, is not repugnant, &c."

In the case of Daniel Ball, "110 Wal. 541," the court says: "Those rivers are public navigable rivers in law, "which are navigable in fact, and they are navigable in "fact, when they are susceptible of being used in their or- "dinary condition, as highways for commerce, over which "trade and travel are, or may be conducted, in the cus- "tomary modes of trade and travel by water." The same doctrine has been reiterated, by the same court, in the case of The Montello, 11 Wal. 411. In the case of the Montello, the circuit court of the United States, in compliance with the order of the supreme court, made a careful investigation into the facts, and adjudged that the Fox river was not a navigable stream, within the provisions of the act of congress, and dismissed the libel. Case now in this court. This stream is made navigable by a private corporation, toll collected, you might as well call the Wabash canal a navigable stream, within the act of congress,

and libel the canal boat, the old horses. and the ragged driver. The Fox river not being a navigable river of the United States, above Depere, (that being the first rapids, and where the first lock is), boats engaged in the navigating the waters of Fox river, between Berlin and Oshkosh, do not come within the provisions of said act.

It may be claimed, that the plaintiff has admitted, that it is navigable, &c.; there is no such admission Plaintiff admits merely a truth, that boats run between said points, the mode of navigating is explained by evidence (folios 60 and 61. (In printed case, State Sup. Ct.) A stream that is navigable, is one thing, this includes streams that will float logs; a stream that is one of the navigable waters of the United States, and comes within the jurisdiction, &c., is entirely another thing, and what constitutes such, is explained in the cases above cited. It is a stream navigable for boats in its natural state, not one made navigable by canals' &c , constructed, or maintained, by private corporations.

SEVENTH.

That aside from any condition, in the policy, that negligence is no excuse, it is unnecessary to cite the numerous unconflicting authorities. See Troy Fire Ins. Co, vs Carpenter, 4 Wis. 20; Digest of F. I. Decisions 373. To take up the various provisions of the act of congress and these rules, is unnecessary, for the reason that they are out of the case for two causes: First —They did not apply to this boat. Second—The defendant omitted to allege any such defensive matter, in its answer. The defendant amidst the numerous questions propounded, failed to prove either when rules were established, or when they went into effect, the law was passed February 21, 1871, boat burned in July, 1871, it is not to be presumed, that they had either been established, or had gone into operation. I presume that the navigators of the mighty waters of the Fox, had as much knowledge of these rules, as a Pawnee Brave has of the Vedas of Hindoostan.

The provision in the policy, refers only to state or local

laws, or regulations. It only excuses a liability when loss arises from such deviation, &c. It is of no account, in this action, the defendant has not set up in his answer, that this was caused in consequence of any deviation, &c.

EIGHTH.

The clause under which this company attempts to crawl out is, "*nor in consequence of any neglect, or deviation "from the laws, or regulations of police, when such "exist.*"

The policy provides only, that the company shall not be liable for loss from one in consequence thereof. The materiality of the numerous questions asked by defendant, I have been unable to discover; they were to show that the plaintiffs had violated the laws of the United States, did not propose or offer to show that the loss was caused thereby; hence, entirely immaterial.

A party to a contract cannot avoid its obligations, by reason of allleged breach of a condition precedent, by inference or conjecture; the terms of the contract must be clear, and explicit in his favor.

Clinton vs Hope Ins. Co, 45 N. Y. 454.

Insurance has become as common, as the carrying of goods by a common carrier.

I believe it is well settled, that common carriers can limit their liabilities by express contract. But it is likewise well settled, that to exonerate a common carrier, there must be no deception practiced, it must clearly appear, that the owner clearly understood the conditions; that the conditions are resonable; and such as it may be fairly supposed, that the owner assented to, nothing but the clearest and most satisfactory evidence, that he did assent thereto should be received; that all conditions exonerating the carrier from liability should be clearly and plainly expressed in the contract, and in form readily to attract the attention of the consignor ot the goods.

2 Redfield on R. sub. 12, page 20; idem sec. 9, page 71; also see snb, 10 p. 77. Verner vs Sweitzer, 32 Penn.

St. 208; also sec. 10 Red; the burden of proof is upon carrier, idem sub. 7, 12, 97.

There is a close analogy between carriers' contract, and a policy of insurance. The former is a bill of lading with all the special conditions in fine print. A policy of insurance is mostly written, and what is printed is in large print followed with innumerable conditions in fine print, conditions jumbled together, difficult to decipher, even by an expert. That the same conditions must be put upon a contract of insurance, as upon a carrier's contract viz: any condition exonerating the insurer from ordinary liability, should be clearly and plainly expressed in the policy, and in a form readily to attract the attention of the assured.

That the insurer cannot avoid its obligations by mere inference and conjecture, but only upon conditions, that are clear an explicit in its favor. See Clinton vs. H. I. Co. Supra.

The insurer cannot avoid liability by alleged breach of a condition, which is obscurely expressed, that it requires a scientific man to explain its meaning, or translate. That a condition to avoid a liability, must be so clear and explicit that all can readily understand it.

See Clinton vs H. I. Co. 45 N. Y. 454.

In the language of Judge Davis, "Good faith to the assured requires that they should declare their intentions "in terms which cannot admit of controversy."

Insurance Company vs. Slaughter, 12 Wallace 407.

If by the use of obscure language in the policy, the design, or intention is doubtful, the constructions thereof will be most unfavorable to the company. Merrick vs. Germania, &c., Ins. Co., 54 Penn. St. R. 277 Provisos and conditions in policies are to be construed strictly against the Co. Hoffman et al, vs. The Ætna, &c., 32 N. Y. 404. Every intendment is to be made against a construction of a contract under which it would operate as a snare. Hoffman et al., vs. The Ætna, &c. For general rules for the construction of policies, see case last cited. A forfeiture of a policy of insurance is to be construed strictly,

and not favored. N. B. Co. vs. N. Eng., &c., Ins. Co. 52 Me. 336. Conditions providing for disabilities and forfeitures are to receive, when the intent is doubful, a strict construction against those for whose benefit they are introduced. Livingston vs. Sickles, 7 Hill 255; Catlin vs. Springfield Ins. Co., 1 Sumn. 434; Breasted vs. Farmers Loan and Trust Co.. 4 Seld. 305. Those rules of construction have a peculiar force, and should be strictly enforced in contracts of insurance when an attempt is made to seize upon words introduced as a safeguard against fraud to defeat the claim of the assured on the theory of technical forfeiture without fault. Hoffmann et al, vs Ætna, Supra.

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